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OPENNESS AT THE COURT OF JUSTICE OF THE EUROPEAN UNION: TOPPLING A TABOO

ALBERTO ALEMANNO and OANA STEFAN*

ABSTRACT

Despite the pervasive rhetoric of transparency in the EU, the openness of the Court of Justice has received little attention. Openness consists of various forms of active cooperation and communication between the EU institutions and the public. While the Court has consistently guaranteed the principles of transparency of judicial proceedings and publicity of trial vis-à-vis the parties (stemming from Art. 6 ECHR), it has not provided a similar level of “openness” beyond this. By establishing that openness applies essentially to the work of the executive and legislative, the Court emphasized the specificity of its judicial task. This article examines to what extent the public is informed or may obtain information concerning the activity of the Court, paying due regard to the distinction made in Article 15 TFEU between administrative and judicial tasks. It argues that Article 15(1) requires rendering all the activities of the Court more open.

1. Introduction

Openness is a principle that has progressively been integrated in European law,¹ first through the decisions of the Court in relation to the right of access to documents and then, after the 1990s, through Treaty amendments² and secondary legislation.³ Currently enshrined in Article 1 TEU (“decisions are taken as openly as possible and as closely as possible to the citizen”) and 15 TFEU (the institutions “shall conduct their work as openly as possible”), the principle of openness consists essentially of various forms of active cooperation and communication between the EU institutions and the public, typically entailing access to information.⁴ A very important component of the principle is transparency, of which the most concrete manifestation is the right

* Alberto Alemanno is Jean Monnet Professor in EU Law and Risk Regulation, HEC Paris and Global Clinical Professor, New York University School of Law. Oana Stefan is Senior Lecturer in Public and European Law, King’s College London. We are grateful to the judges, advocates general, *référéndaires* and officials at the EU Courts for generously sharing their personal thoughts on some of the issues with us. We thank Michal Bobek (College of Europe), Giuseppe Martinico (CEPS), Philipp Speitler (EFTA Court), Alessandro Spina (EMA) and the anonymous reviewers for comments on a previous draft and Daniel Sarmiento (CJEU) for inspiring discussions over the years. Cliff Wirajendi’s and Adam Jaffee’s research assistance is appreciated. All errors and omissions remain the sole responsibility of the authors

¹ See on this point, Bugarcic, “Openness and transparency in public administration: Challenges for public law”, 22 *Wis. Int. Law J.* (2004), 487 et seq; and for a comparative perspective of the principle, see Ziller, “European models of government: Towards a patchwork with missing pieces”, 54 *Parliamentary Affairs* (2001), 102-119.

² See Art. 1(2) TEU.

³ Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001, L 145/43.

⁴ Craig, *EU Administrative Law* (OUP, 2012), at p. 357 (who argues that transparency encompasses a number of different features, such as holding of meetings in public, the provision of information and the right of access to documents) and Bugarcic, “Openness and transparency in public administration”, op. cit. *supra* note 1.

of access to documents.⁵ This represents by far the most developed legal dimension of openness, having been elaborated through secondary legislation, in particular Regulation 1049/2001,⁶ which is currently under revision.⁷

After famously pioneering the inclusion of openness among the principles of European law⁸ and actively imposing its respect for all EU institutions,⁹ the Court of Justice of the European Union (hereinafter CJEU)¹⁰ has shown circumspection with regard to extending the application of the principle to its own activities in the name of the specificity of the judicial process. In particular, the CJEU's stance seems motivated by the concern to preserve the serenity of its proceedings while discharging its duties of *dicere legem*. Thus, while the EU Courts have fully guaranteed access to the court file and publicity of trial as applicable to the parties of a case under Article 6 ECHR, different, lower, and still largely undefined standards of openness appear to be used with regard to the general public, i.e. to individuals not involved in judicial activities.¹¹

An important development in this area occurred recently, when a decision was published on public access to documents held by the CJEU in the exercise of its administrative functions.¹² While this decision will undoubtedly enhance openness of the non-judicial activity of the Court, some further steps in this direction would be welcome. Thus, for instance, the current presumption that third-party access to Court submissions undermines the protection of judicial proceedings appears difficult to reconcile with the imperative of openness.¹³ Moreover, despite

⁵ Levitt, "Access to the file: The Commission's administrative procedures in cases under Articles 85 and 86", 34 CML Rev. (1997), 1413 et seq; Curtin, "Citizens' fundamental right of access to EU information: An evolving digital passepartout", 37 CML Rev. (2000), 7 et seq; Curtin and Meijer, "Does transparency strengthen legitimacy?", 11 *Information Polity* (2006), 109 et seq; Peers, "The new regulation on access to documents: A critical analysis", 21 YEL (2002), 385 et seq; Broberg, "Access to documents: A general principle of Community law", 27 EL Rev. (2002), 194; De Leeuw, "The regulation on public access to European Parliament, Council and Commission documents in the European Union: Are citizens better off?", 28 EL Rev. (2002), 324.

⁶ Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001, L 145/43.

⁷ Proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents, 30 April 2008, COM(2008)229 final, 2008/0090(COD).

⁸ In particular, the first legal recognition of "transparency" derived from the administrative right of access to file, which aims at securing the right to be heard, was developed in competition law well before it made its entry into EU law as a general constitutional right of access to documents. See e.g. Prechal and de Leeuw, "Transparency: A general principle of European law?" in Bernitz, Nergelius and Cardner (Eds.), *General Principles of EC Law in a Process of Development* (Kluwer, 2008), 201-242; Settembri, "Transparency and the EU legislator", 43 JCMS (2005), 637-654, at 639; Curtin, op. cit. *supra* note 5.

⁹ See e.g. Case C-260/04, *Commission v Italy*, [2007] ECR I-7083.

¹⁰ In general, this *Review* still uses the informal abbreviation "ECJ" to refer to the European Court of Justice. In the present article, however, a careful distinction is made between the Court as an institution and the judicial body known as the Court of Justice. For that reason, the abbreviation CJEU is here used to refer to the institution. Unless specified otherwise, in this article the term Court (or also EU Courts) refers – in line with Art. 19 TEU – to the Court of Justice of the European Union (CJEU) as encompassing the Court of Justice (CJ), the General Court (GC) as well as the Civil Service Tribunal (CST).

¹¹ It must be observed that the duty of transparency imposed on the EU judiciary towards the parties to the dispute stems from the general principle of access to justice and its related procedural rights, not from the transparency provisions contained in the Treaties. The latter provisions create instead a set of rights to the benefit of the general public.

¹² Decision of the Court of Justice of the European Union of 11 Dec. 2012 concerning public access to documents held by the Court of Justice of the European Union in the exercise of its administrative functions (2013/C 38/02).

¹³ See *infra* 4.1.2.

having been “the unsung hero of those seeking to open up the inner institutional workings of the EU”,¹⁴ the Court fails to render its hearings more accessible by not retransmitting them. Moreover, while the outcome of decisions regarding the internal functioning of the Court¹⁵ is generally brought to the public’s attention through adequate forms of publication, the underlying processes are not. Finally, the CJEU’s archives are closed to the public and no known policy governs their access.¹⁶

Despite the growing public sensitivity to institutional openness, such issues seem to have largely escaped institutional attention and academic scrutiny.¹⁷ This appears to be an exception in the “dominant Court-centred work in EC law scholarship”,¹⁸ but is also a symptom of a deeper phenomenon, which was effectively depicted by Joseph Weiler when he sarcastically wrote that the custodians of the EU legal order, as lawyers, were a “conservative bunch”.¹⁹ Indeed, as openness and transparency progressively became the modern buzzwords in debates on accountability and legitimacy of non-elected organizations,²⁰ they quickly became a taboo subject both within²¹ and outside the EU judiciary.²² From an institutional perspective it was observed that the Court recently entered an era of “bewildering silence”,²³ lacking a policy of openness with regard to its internal functioning. From an academic point of view, the established transparency studies have focused mainly on the way in which the Court helped to introduce the principle within the EU legal order and encouraged its application to the executive body.²⁴ The

¹⁴ Heliskoski and Leino, “Darkness at the break of noon: The case law on Regulation 1049/2001 on access to documents”, 43 CML Rev. (2006), 735-781.

¹⁵ These involve, among others, the procedures regarding the composition of the chambers, or governing the allocation of the cases among judges. See e.g. 254 TFEU and Art. 16 (CJ), Art. 50 (GC) of the Statute and Annex to the Statute (CST).

¹⁶ The Historical Archives of the European Union (HAEU) report that more than 3,500 linear meters of archives have been sent from the various EU institutions to their headquarters in Fiesole, Italy, by annual shipment. While file transfers are expected to increase in view of the HAEU’s mission to provide a single preservation and access point for research on primary sources for all the EU institutions, the Court’s archives have not yet been transferred to the HAEU. See <www.eui.eu/HAEU/Lfonds/ec.asp> (last visited 15 Nov. 2013).

¹⁷ The only exception is offered by those contributions written extrajudicially by some members of the Court, see e.g. Jacobs, “Recent and ongoing measures to improve the efficiency of the European Court of Justice”, 29 EL Rev. (2004), 823-830; Timmermans, “The European Union’s judicial system”, 41 CML Rev. (2004), 393-405; Lenaerts, “The rule of law and the coherence of the judicial system of the European Union”, 44 CML Rev. (2007), 1625-1659; Vesterdorf, “La nomination des juges de la Cour de justice de l’Union européenne”, 3 CDE (2011), at 601; Rosas and Armati, *EU Constitutional Law: An Introduction* (Hart, 2012), pp. 138 et seq.

¹⁸ Introduction, in Shaw and More (Eds.), *New Legal Dynamics of European Union* (OUP, 1995).

¹⁹ Weiler, “Epilogue”, in De Búrca and Weiler, *The European Court of Justice* (OUP, 2001), at p. 215.

²⁰ Seim, “By what authority? The legitimacy and accountability of non-governmental organizations”, paper delivered at The International Council on Human Rights Policy International Meeting on Global Trends and Human Rights — Before and after September 11, Geneva, 10-12 Jan., available at <www.jha.ac/articles/a082.htm> (last visited 15 Nov. 2013).

²¹ As denounced by Sharpston, “Transparency and clear legal language in the European Union: Ambiguous legislative texts, laconic pronouncements and the credibility of the judicial system”, 12 CYELS (2010), 409-423.

²² See e.g. Anderson, “Transparent virtue: Secrecy in the courts: At the tipping point?”, 53 *Villanova Law Review* (2008), 811 et seq., and, more recently, see Open Society Justice Initiative, Report on Access to Judicial Information, March 2009, at <www.right2info.org> (last visited 15 Nov. 2013).

²³ Rasmussen, “Present and future European judicial problems after enlargement and the post-2005 ideological revolt”, 44 CML Rev. (2007), 1661 et seq., at 1687.

²⁴ Lenaerts, “‘In the Union we trust’: Trust – enhancing principles of Community law”, 41 CML Rev. (2004), 317 et seq., at 318-319. See also on the principle of transparency Lodge, “Transparency and democratic legitimacy”, 32 JCMS (1994), at 343; Curtin, “Betwixt and between: Democracy and transparency in the governance of the European Union”, in Winter et al. (Eds.), *Reforming the Treaty on European Union: The Legal Debate* (Kluwer,

rich and evergreen literature on the EU judicial system does not seem to have explored the application of openness and transparency to the CJEU's own activity, with some exceptions,²⁵ thus further consolidating the taboo.

Amid the latest institutional reforms, the taboo has been gradually toppled. Indeed, Article 15 TFEU expressly extends the application of the principle of openness to the work of the CJEU,²⁶ yet not without carving out some notable exceptions aimed at sheltering from the reach of the public the Court's inner mission: the judicial proceedings and the documents produced therein. As a result, Courts are subject to the duty of transparency regarding proceedings and documents "only when exercising their administrative tasks".²⁷ Given this new legal framework, the following analysis aims at evaluating to what extent the public is informed or may obtain information concerning the activity of the EU Courts. The article acknowledges that certain actors might have supplementary needs from the point of view of transparency. Such are the parties to the trial, to which higher standards of openness apply in order to ensure proper administration of justice. Likewise, the cooperation between the CJEU and national courts – which has been instrumental for EU integration – needs open and effective communication adapted to the requirements of the judicial tasks accomplished by these institutions. While noting such specificities, this article focuses mainly on general standards, applicable to the general public interpreted widely: institutions, the media, academics, businesses, and individuals.

In section 2, we briefly reconstruct the evolution of the principles of openness and transparency and provide an assessment of their respective normative content by closely examining their textual bases, while taking into due account their specificities when applied to judicial activities. Sections 3 and 4 determine what information and which activities are currently open to the public, while paying due regard to the regulatory distinction established by Article 15 TFEU between the general level of openness that needs to be ensured institutionally and the limitations on transparency stemming from the specificities of judicial tasks.

2. The normative framework

Both openness and transparency are more often invoked than defined. While there is no single definition of the principle of openness or that of transparency in EU law, these terms are often used interchangeably to convey a common idea: the "opposite of opaqueness, complexity or even secretiveness".²⁸ The semantic confusion surrounding these two words, which has helped to muddy their normative differences, has to do with the way in which these principles have progressively been integrated into EU law.²⁹ This section will first provide some clarifications,

1996); Peers, "From Maastricht to Laeken: The political agenda of openness and transparency in the EU", in Deckmyn (Ed.), *Increasing Transparency in the European Union* (EIPA, 2002).

²⁵ Notable exceptions are Rasmussen, "Present and future European judicial problems after enlargement and the post-2005 ideological revolt" op. cit. *supra* note 23; Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP, 2004), Sharpston, op. cit. *supra* note 21; Stone Sweet, "The European Court of Justice", in Craig and De Burca, *The Evolution of EU law* (OUP, 2011), at p. 146.

²⁶ Leino, "Just a little sunshine in the rain: the 2010 case law of the European Court of Justice on access to documents", 48 CML Rev. (2011), at 1220.

²⁷ Judgment in Joined Cases C-514/07, 528/07 & 532/07, *API*, [2010] ECR I-8533, para 81.

²⁸ Prechal and de Leeuw, op. cit. *supra* note 8, at p. 202.

²⁹ For an overview on the genesis and evolution of transparency in the EU, Bradley, "La transparence de l'Union européenne: une évidence ou un trompe d'œil", (1999) CDE, at 283; Curtin and Meijer, op. cit. *supra* note 5.

while examining the normative content of the principles of openness and transparency. It will then move to examine the application of the principles in a judicial setting, in particular, the way in which they can be operationalized at the level of the EU Courts.

2.1 Openness and transparency in EU law

While the Amsterdam Treaty codified both principles, it is only the principle of transparency that had been fully applied at the time. This had occurred initially through the case law of the Court,³⁰ which recognized a right of access to file as a corollary of the procedural right to be heard. Subsequently, the Treaty of Amsterdam introduced via Article 255 EC a general right of public access to European Parliament, Council and Commission documents, implemented through Regulation 1049/2001 and subject to further judicial development.³¹

However, in this initial stage of the evolution of thinking about openness /transparency, the EU institutions operationalized the principle exclusively with respect to access to documents and ensured it only passively, since they were not required to go beyond providing individuals with information when they specifically asked for it. The implementation of the principle of transparency as a right of access to documents was – and still remains – specific, unidirectional and bottom-up: its enjoyment requires that citizens actively demand a given piece of information from a given institution.

Yet the adoption of the White Paper on Governance generated a second, political stage in the evolution of the principle, with the Commission advocating transparency as a means to enhance legitimacy.³² The Commission placed “openness” alongside other “principles of good governance” values such as accountability and participation.³³ As a result of this process, the openness principle – originally enshrined in Article 1 TEU and asserting that the Union’s institutions and bodies have to conduct their work “as openly as possible” – has been transformed by the Lisbon Treaty from a mere aspirational provision³⁴ into a prescriptive one. In particular, by providing it with an autonomous normative content, Article 15 TFEU operationalizes the principle of openness by making it a judicially enforceable principle of law.³⁵ We argue that the resulting principle of openness encompasses today the principle of transparency as an important component (or corollary) that maintains its own autonomous normative content. Indeed, a quick look at the way in which these principles have evolved, their textual underpinnings,³⁶ their rationale as well as the interests that they are aiming to protect,

³⁰ Indeed, since the 1960s the CJEU recognized the right of access to the file as a part of the right of defence in the area of competition law. See e.g. Ragnelman, “The Community Courts and openness within the European Union”, 2 CYELS (1999), 19-30; Vesterdorf, “Transparency – not just a vogue word”, Fordham Int. Law Journal (1999), 902-929.

³¹ Leino, *op. cit. supra* note 26, at 1220.

³² For a critical overview on the relationship between transparency and legitimacy, see Curtin and Meijer, *op. cit. supra* note 5.

³³ Maher, “Transparency in the EU – An open and shut case”, 1 *European Access* (1997), 9-11.

³⁴ See on the lack of direct effect of the principle of openness, Curtin, “The fundamental principle of open decision-making and EU (political) citizenship”, in Twomey and O’Keefe (Eds.), *Legal Issues of the Amsterdam Treaty* (Hart Publishing, 1999), pp. 71-91, at p. 72. See Case T-191/99, *Petrie and Others v. Commission*, [2001] ECR II-3677, paras. 34-38.

³⁵ This provision also replaces Art. 255 EC, which served as legal basis for the adoption of Regulation 1049/2001.

³⁶ In carving out an exception from the principle of transparency (transparency of proceedings and access to documents), Art. 15(3)(4), limits the applicability of this exception to “this paragraph,” i.e. Art. 15(3) dealing exclusively with the principle of transparency and not with the broader principle of openness. According to a

confirms that transparency no longer exhausts the normative content of openness, which today emerges as a self-standing principle.³⁷

First of all, under Article 15(1), “the Union’s institutions, bodies, offices and agencies *shall* conduct their work as openly as possible”, “in order to promote good governance and ensure the participation of civil society”. This is clearly a more specific and more prescriptive³⁸ provision than Article 1 TEU. As a result, the principle of openness applies today to *all* EU institutions – including the CJEU – and imposes on them an autonomous duty to “open” their activities to the public.³⁹ Thus, Article 15(2) provides that both the European Parliament and Council meet in public when considering and voting on draft legislative acts. Although this is the only Treaty effort to specifically translate the principle of openness into concrete application, it does not exhaust its normative content. Not only are all other institutions subject to the principle but they also need to proactively open their operations to the public. Although the contours of the principle of openness have not been fully defined, it is intuitive to believe that these tend to go well beyond a mere duty of holding public meetings and ensuring access to documents. This is confirmed by the fact that this new provision proves a shift from a regime that ensures openness as an end in itself to one that ensures openness as a means to obtain other goals, such as legitimacy and good governance.

Legitimacy has been historically linked to the need to inject openness and transparency into public administration, and the evolution of thinking on “transparency” has followed a similar path under EU law.⁴⁰ According to political theory, providing citizens with the possibility to take part in, understand, feed and monitor the decision-making process may enhance the acceptability and overall legitimacy of the outcome of this process, as well as of the underlying institutional structures.⁴¹ The principle of openness – as enshrined in Article 15(1) TFEU – consists not only of the rather passive right of every citizen to have access to information but also of a more pro-active institutional duty to ensure that all its actions, as well as the information about these actions, are carried out in an accessible and understandable way.⁴² We believe that this reading is in line with the spirit of Article 15(1), since, as noted above, openness is viewed by the decision makers as a means to enhance the legitimacy of EU action, by promoting active participation. This is of course not to say that transparency can be a panacea to all legitimacy problems of the European Union. As rightfully pointed out by Curtin and Meijer, the assumptions linking transparency and input legitimacy, output legitimacy or social legitimacy are weak. That is because of various factors, such as information overload, proceduralization, and the risk that the media cherry-picks only information that highlights policy failures.⁴³

contrario reading, the latter principle applies to the CJEU and the other institutions mentioned regardless of the nature of the activity it undertakes.

³⁷ Alemanno, “Unpacking the principle of openness under EU law: Transparency, participation and democracy”, EL Rev., forthcoming (2014).

³⁸ Given the use of the word “shall”.

³⁹ This interpretation – suggesting the existence of an autonomous normative content of the principle of openness – is confirmed by the wording of Art. 15(3)(4).

⁴⁰ Craig, op. cit. *supra* note 4, at p. 356; Curtin and Mendes, “Transparence et participation: des principes démocratiques pour l’administration de l’Union européenne”, (2011) *Revue française d’administration publique*, 101-121; Rosendorff, Hollyer and Vreeland, “Democracy and transparency”, 73 *The Journal of Politics* (2001), 1191-1205.

⁴¹ See e.g. Curtin and Meijer, op. cit. *supra* note 5, at 111.

⁴² Brandsma, Curtin and Meijer, “How transparent are EU comitology committees?”, 14 ELJ (2008), at 827; Craig, op. cit. *supra* note 4, at p. 359.

⁴³ Curtin and Meijer, “Does transparency strengthen legitimacy?”, op. cit. *supra* note 5.

While Article 15(1) overhauled the principle of openness, endowing it with a broad normative meaning, Article 15(3) operationalizes its corollary, the principle of transparency, while providing it with an entirely new substantive and procedural framework. From a substantive point of view, Article 15(3) recognizes the existence of an autonomous citizen's right of access to documents from *all* EU institutions, instead of just the Council, Commission and European Parliament, "whatever their medium". From a procedural point of view, the second subparagraph entrusts the European Parliament and the Council with the authority to determine – "by means of regulations" – the "general principles and limits ... governing this right of access to documents".

Currently, Regulation 1049/2001 covers most EU institutions because either a separate legislative act has extended that Regulation to them or because they have adopted - on a voluntary basis - rules that guarantee access to their documents.⁴⁴ A notable exception used to be the EU Courts, for which no rules had been adopted until the recent decision of the Court concerning public access to documents. The recent Court decision on access to administrative documents comes at the right moment since, after imposing on all EU institutions the obligation "to ensure that (their) proceedings are transparent", Article 15 TFEU requires them to elaborate in their Rules of Procedure "specific provisions regarding access to documents, in accordance with the regulations" adopted by the European Parliament and the Council.

In conclusion, having largely overlapped with transparency until the adoption of the Lisbon Treaty, openness emerges today as a stand-alone, overarching principle including but not limited to transparency. While the latter principle is well known, as it consists essentially of ensuring access to the proceedings and documents, the essence of the openness principle is more obscure.

2.2 Rationale and scope of openness at the CJEU level

The application of the principle of openness to Court settings has long been considered as enhancing the protection of fundamental rights. In fact, judicial openness can be traced to the 19th century writings of Bentham who advocated the "publicity" of trials and their accessibility to the general public.⁴⁵ This principle, applied to criminal proceedings, was integrated in constitutions all over the world, and is also articulated in Article 6 of the ECHR. The publicity of trials does not concern only criminal cases,⁴⁶ and it involves first and foremost open access to court proceedings and the possibility of individuals, interest groups and the press to attend court. Recent studies consider that the public can participate not only as spectators, but also actively, by making their own assessment of what happens in court and legitimizing or withdrawing legitimacy from the judicial body.⁴⁷ In practice, this can increase (or decrease) trust in the judicial body. With regard to the debate on public access to pleadings in cases before the CJEU, academic research has pointed out that openness renders public debate about EU actions

⁴⁴ The European Central Bank, the European Investment Bank, the European Court of Auditors, the European Economic and Social Committee, the Committee of the Regions as well as Europol and Eurojust have all adopted – on a voluntary basis – rules on access to their documents which are identical or similar to the Regulation.

⁴⁵ Bentham, "Chapter X – Of publicity and privacy, as applied to judicature in general, and to the collection of the evidence in particular", in Tait (Ed.) *The Works of Jeremy Bentham* (1843), 351 et seq, at 355.

⁴⁶ Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (Routledge, 2011), at p. 85.

⁴⁷ Duff, Farmer, Marshall and Tadros, *The Trial on Trial: Towards a Normative Theory of the Trial, Volume Three* (Hart Publishing, 2007).

possible, thus increasing the legitimacy of these actions and the proper administration of justice.⁴⁸

As mentioned in the previous section, we acknowledge the pitfalls of relying too much on transparency as a solution for legitimacy problems. At the same time, the need to translate this debate to the specificities of judicial settings needs to be highlighted. The judiciary typically presents different legitimacy credentials than the legislature.⁴⁹ Here we tend to believe that a court is generally presumed to enjoy institutional legitimacy when the public regards it as a trustworthy decision-maker whose rulings deserve respect.⁵⁰ The CJEU – like any other court – acts as an organism delegated by two parties to solve – though often indirectly – their dispute. According to its mission, it needs to preserve its neutrality in the eyes of each party to the case, but, in resolving the dispute, it will inevitably compromise this neutrality by declaring one party the loser.⁵¹ The legitimacy of judicial decisions depends thus to a large extent on the ability of the court to engage with all the arguments put forward by the parties to a case.⁵² By openly communicating the debate taking place between the parties, as well by clearly justifying its own position *vis-à-vis* both of them, the court creates the premises for the parties – and indeed for the wider public as well – to assess whether a certain judgment took into account all the arguments put forward in the case, and whether the law was observed. Of course, a court will be regarded as enjoying institutional legitimacy only if it manages, substantially, to acquire the respect and the trust of the citizens, by acting in accordance with the law. However, in order to undertake such an assessment of judicial quality, the parties and the general public must first and foremost have access to the arguments presented in the judgment, as well as to the debate that took place before the Court.⁵³ Openness can thus be considered an important prerequisite that a diligent court needs to ensure in order to achieve institutional legitimacy.

Furthermore, through the preliminary ruling procedure, the Court is meant to assist national courts in the application of EU law. In this connection, it was pointed out that a policy of openness and communication might bolster the legitimacy of the Court *vis-à-vis* national courts. A smoother information flow between the CJ and national courts enhances mutual understanding and renders compliance with EU case law more feasible.⁵⁴ Indeed, an open and transparent judiciary may serve not only to increase public knowledge about its judicial operation but also to bolster the accountability and legitimacy of its outputs.⁵⁵

Following the entry into force of the Lisbon Treaty and the re-writing of Article 255 EC, the principle of openness has acquired the status of an autonomous and legally enforceable principle.⁵⁶ Therefore, even though it is undisputed that the judicial activity of the Court – being by definition non-administrative – is exempted from the safeguards of Article 15(3), this activity

⁴⁸ See e.g. Adamski, “How wide is “the widest possible”? Judicial interpretation of the exceptions to the right of access to official documents revisited”, 46 CML Rev. (2009), 521 et seq., at 534.

⁴⁹ Habermas, *Between Facts and Norms* (MIT Press, 1996), p. 229 et seq.

⁵⁰ Fallon, “Legitimacy and the Constitution”, 118 *Harvard Law Review* (2005), 1789 et seq., at 1795.

⁵¹ Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, 2000), at p. 15.

⁵² Opinion of A.G. Maduro in *API*, cited *supra* note 27, para 34; see also Stone Sweet, op. cit. *supra* note 51, p. 16.

⁵³ See, on this point, von Bogdandy and Venzke, “In whose name? An investigation of International Courts' public authority and its democratic justification”, 23 *EJIL* (2012), 7-41.

⁵⁴ Bobek, “Of feasibility and silent elephants: the legitimacy of the Court of Justice through the eyes of national courts”, in Adams et al. (Eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Hart, 2013), pp. 197-234, at Section 4.a.

⁵⁵ Von Bogdandy and Venzke, op. cit. *supra* note 53, p. 26-27.

⁵⁶ Mendes, “Participation and the role of law after Lisbon: A legal view on Art. 11 TEU”, 48 CML Rev. (2011), at 1849; Alemanno, op. cit. *supra* note 37.

does not escape all requirements imposed by the principle of openness. Indeed, by extending the principle of openness to the CJEU, Article 15(1) illustrates that there exists an autonomous area of openness that should be guaranteed regardless of the nature, administrative or non-administrative, of the activity undertaken by the CJEU.⁵⁷ The Court is set to gradually define this area when – on the basis of Article 15(1) TFEU – it will be asked to determine the precise normative content of the principle of openness.

It is against this backdrop that the next two sections assess how the activities of the EU Courts fare under the principle of openness. In so doing, the analysis introduces a fundamental distinction between the specific standard of transparency that needs to be observed with regard to the fulfilment of administrative tasks and the general standard of openness that applies to both the administrative side of the Court's activities and its "judicial tasks". Absent a detailed regulatory framework in this regard, we shall consider the general standard of openness as including public access to information, as well as the pro-active institutional duty to ensure that information about judicial activities is provided in an accessible and understandable way. Given the exception provided in Article 15 TFEU, due account has to be taken of the fact that transparency concerning certain proceedings or files can be lawfully subject to limitations.

3. Openness at the administrative level

Any attempt to define the scope of the principle of transparency as applicable to the EU Courts by virtue of Article 15(3) TFEU requires a preliminary categorization of their activities along two dimensions. The first has to do with their administrative tasks (the "court administration") and is subject to the general rules of transparency. The second relates instead to non-administrative tasks (the "court jurisdiction") to which the transparency requirements do not apply. This section scrutinizes the extent to which the CJEU respects transparency in its administrative activities, which are thus subject to the general requirements of Article 15 TFEU. We consider the following activities to fall under the administrative (non-judicial) category: organizational functioning, human resources management, and ensuring infrastructure.

3.1 The organizational functioning of the Court

Due to its polysemic nature, the term "Court of Justice" as employed in the Treaties and Statute refers both to the umbrella organization encompassing the three jurisdictions as well as specifically to its highest instance. Consequently, the three Luxembourg courts share the same administrative apparatus, coordinated by the CJ Registrar, who ensures the direction of the departments,⁵⁸ under the authority of the President.⁵⁹ According to the Statute, officials and other servants attached to the CJEU are entrusted to render their services to the General Court (GC) by common accord between the Presidents of the two courts.⁶⁰ Furthermore, the Annexe to the Statute provides that the Civil Service Tribunal (CST)⁶¹ is supported by the departments of the

⁵⁷ Alemanno, op. cit. *supra* note 37.

⁵⁸ With the exception of the internal audit department, which is directly attached to the President.

⁵⁹ Arts. 10, 12 and 52 of the CJEU Statute.

⁶⁰ See Art. 52 of the Statute.

⁶¹ For an initial analysis of the CST, Cameron, "Establishment of the European Union Civil Service Tribunal", 5 *The Law and Practice of International Courts and Tribunals* (2006), 273-283.

Court of Justice and of the General Court.⁶² The CJ, the GC as well as the CST appoint their own Registrars.⁶³ The administrative staff is responsible to the respective Registrars under the authority of the Presidents.⁶⁴ It follows that transparency with regard to the organizational functioning of the Court depends both on the way in which the Registrars are appointed and on the way in which the administrative action is conducted by the departments of the Courts.

The process of appointing the Registrar was recently rendered more transparent by the new CJ Rules of Procedure.⁶⁵ The new rules provide that a vacancy notice will be published in the Official Journal once the post of Registrar becomes available.⁶⁶ Currently, the procedure leading to the appointment of the Registrar of the other two courts lacks the same level of publicity and overall transparency as that applied by the CJ. Their respective Rules of Procedure only mention that judges analyse and vote on applications received for the post of Registrar, and provide no information as to how these applications were generated.⁶⁷ One may expect that these rules will at some point be aligned to those applicable to the appointment of the CJ's Registrar.⁶⁸ In the same vein, while the organizational chart of the Court's administrative apparatus provides brief information regarding the activities of each department, it contains little information on the persons in charge of the different activities, for instance who are the directors and officials in each division. As provided for in Article 12 of the Statute, officials and other servants, such as the *référéndaires* acting as legal assistants to the judges, are appointed to the CJEU to enable it to function.⁶⁹ Yet their identity is not disclosed and their appointment does not follow a common procedure being a prerogative of each member of the Court. All these officials answer to the Registrar of the Court, who in turn acts under the authority of the President of the relevant jurisdiction.⁷⁰ The conditions under which officials and other servants of the CJEU render their services to the GC and CST respectively to enable them to function are determined by common accord by the CJ President, on the one hand, and the GC and CST Presidents, on the other.⁷¹ Since appointments are essentially tasks of an administrative nature, one may expect these decisions to fall within the scope of Article 15 TFEU. Yet, there is no official list – unlike those available in virtually all other EU institutions, bodies and agencies – with the names and contact details of these officials, at least those whose activities affect third parties.⁷² Seen from the

⁶² See Art. 6 of Annex I of the Statute.

⁶³ As laid down in Arts. 253(5), 254(4) TFEU and Art. 6 of Council Decision of 2 Nov. 2004 establishing the European Union Civil Service Tribunal 2004/752/EC, O.J. 2004, L 333/7.

⁶⁴ Arts. 10, 12 and 52 of the CJEU Statute, and Art. 6 of Annex I of the Statute.

⁶⁵ Rules of Procedure of the CJ, O.J. 2012, L 265/1 in Art. 18. For an initial appraisal, Gaudissart, “La refonte du règlement de procédure de la Cour de justice”, 3 CDE (2012), 603-670.

⁶⁶ See Art. 18 of the Rules of Procedure of the CJ.

⁶⁷ Art. 20 of the Rules of Procedure of the GC and Art. 15 of the Rules of Procedure of CST.

⁶⁸ Communication with members of the cabinet of the GC President, 20/02/2013.

⁶⁹ The literature on the role of *référéndaires* is scarce. However, one may refer to Kenney, “Beyond principals and agents: Seeing courts as organizations by comparing *référéndaires* at the European Court of Justice and Law clerks at the U.S. Supreme Court”, 33 *Comparative Political Studies* (2000), 593-625; Grass, “Les ressources humaines à la Cour de justice des Communautés Européennes”, in *Mélanges en l'Honneur de Philippe Léger. Le Droit à la Mesure de l'Homme* (Pedone, 2006); and Johansson, “Les *référéndaires* de la Cour de justice des Communautés européennes - Hommes et femmes de l'ombre?”, 3 *Revue des Affaires Européennes* (2007-2008), 563-568.

⁷⁰ See Arts. 12, 52 of the Statute and Art. 6 of Annex I to the Statute.

⁷¹ See Art. 52 of the Statute and Art. 6 of Annex I to the Statute.

⁷² The EU Whoiswho, the official directory of the European Union, does not report all officials employed by the CJEU, but merely some key actors, such as the members, their *référéndaires* and the heads of services. The EFTA Court lists all officials on its website. See <www.eftacourt.int/the-court/members-staff/judges-and-staff/> (last visited 15 Nov. 2013).

perspective of the institutional obligation to actively ensure openness, the President and the Registrar of the Court should make all this information about the court staff available for the citizens.

Another shortcoming from the point of view of administrative openness relates to the fact that, while undoubtedly there is a hierarchy between, on the one hand, the Court of Justice and, on the other hand, the General Court and the Civil Service Tribunal,⁷³ the modalities under which these institutional relations take place are largely unknown. While the EU Courts benefit from a single Statute, the Rules of Procedure applicable to each jurisdiction vary. This is, of course, understandable if one considers the differences in jurisdiction of the three courts. Yet this does not seem to justify the lack of harmonization of those rules governing the same procedural issue across the three courts that could be presented together in a single document. For instance, the rules concerning e-curia, an information technology application allowing the lodging and service of procedural documents by electronic means, although identical for the three Courts, are laid down in three separate decisions.⁷⁴ Likewise, each of the three Courts published on their webpage different documents detailing the instructions for their respective Registrars – which have not been updated for the CJ since 1986.⁷⁵ Although it is understandable to have different instructions for each Registrar, it is surprising that some of the rules relevant to all three Courts do not appear in all the instructions. This concerns the rules on third party access to case files, mentioned solely in the instructions to the GC Registrar, which we will examine below.

Overall, while the end result of administrative decision-making by the EU Courts is generally made available,⁷⁶ a very limited amount of information related to the procedures that enable their organizational administrative functioning is accessible to the public. Indeed, one would expect publication in the Official Journal of information about the process through which organizational decisions have been taken and individual appointments have been made, e.g. as a member of a chamber⁷⁷ or of an administrative committee.

What is more, under the new Rules of Procedure of the CJ, it is expressly established that decisions concerning administrative issues are discussed and taken at the general meeting in which all court members take part.⁷⁸ Yet, as it emerges from the same provision, during this weekly meeting the Court also discusses pending cases and, in particular, adopts decisions upon the proposals contained in the preliminary reports. Due to its inherent judicial component, the general meeting is not open to the public, and the agenda and output thereof are never published. In this context, one may wonder to what extent the current organizational structure of the CJ in relation to the exercise of its administrative tasks – with the exception of the recently adopted rules governing the appointment of the Registrar – allows it to respond to the openness requirement as enshrined in Article 15 TFEU.

⁷³ See e.g. Arts. 12, 52 of the Statute.

⁷⁴ It must be observed that these acts, being decisions, are placed below their respective rules of procedure and may, as a result, be more easily modified.

⁷⁵ The latter are expected to be withdrawn by the CJ as they no longer find a legal basis in the CJ Rules of Procedure.

⁷⁶ The O.J. publishes information with regard to the outcome of the various administrative processes involved, and issues such as the hearing dates are usually available on the webpage of the Court.

⁷⁷ The only indication in this regard is provided for in Art. 16 of the Protocol on the Statute of the CJEU; Art. 11 of the Rules of Procedure of the CJ; Art. 9 of the Rules of Procedure of the GC; Art. 10 of the Rules of Procedure of the CST.

⁷⁸ Art. 25 of the Rules of Procedure of the CJ.

3.2 Access to documents

In line with Article 15(3) TFEU, the Court recently adopted a decision concerning access to its administrative documents. The scope of the decision reflects the limitation provided for in the Treaty, as it covers only the documents prepared in the exercise of the administrative functions of the EU's judicial body. The decision does not discuss the precise parameters defining these "administrative functions", leaving this clarification potentially to case law or further clarifications by the Court administration.

The approach adopted by the CJEU in ensuring access to its documents substantially mirrors that taken by Regulation 1049 in relation to the documents of the other EU institutions. Thus, the beneficiaries of the right of access are not only EU citizens, but also any natural or legal person as long as he or she has a residence or registered office in a Member State. Upon Court discretion, the latter may be granted a right of access even if he or she does not reside or have an office in a Member State. The exceptions allowing the EU Courts to reject a request are the same as in Regulation 1049, and they include public interest, the privacy and integrity of the individual, commercial interests, court proceedings and legal advice, and the purpose of inspections, investigations, and audits.⁷⁹

With regard to the submission of requests, a form is available online for applicants to complete. As provided for in Article 4(5) of the decision, the applicants are not obliged to state their reasons for the application. The procedure for handling requests and eventually confirmatory applications in cases of denied access to documents is similar to that laid down in Regulation 1049. The Court has to acknowledge receipt, process the case swiftly, and inform the applicant of its right to challenge the final decision. The deadlines exceed those in Regulation 1049, allowing in general one month to consider applications (as opposed to the 15-day deadline that applies to the Council, Commission, and Parliament). Similar to what it is provided by Regulation 1049, the refusal of confirmatory applications entitles the applicant to institute judicial proceedings challenging such decision and/or making a complaint to the European Ombudsman.⁸⁰ This provision might arguably give rise to difficult situations, with the Court acting as judge and defendant in the same case.⁸¹

However, the possibility to institute court proceedings against refusals to grant access should be interpreted more as streamlining the functional distinction existing between the CJEU as administrator and the same Court as a judicial body. Indeed, given that the decision at stake applies only to documents issued in the exercise of administrative functions, the authorities empowered to grant access are administrative authorities, such as the Director General whose service holds the document requested, the Head of Service, and the Deputy Registrars.⁸² Therefore, technically, the judges deciding such cases will have to assess the behaviour of administrative structures, and not their own actions. This development is set to strengthen, and perhaps eventually institute, a functional separation between the Court-administration and the Court-jurisdiction. Yet one may wonder whether the development of such a functional separation may run against the competing and equally valuable objective of ensuring a smooth relationship between the Court-jurisdiction and those administrative services its judges depend upon while discharging their judicial tasks.

⁷⁹ Art. 3 of the Decision, cited *supra* note 12.

⁸⁰ Art. 7 of the Decision, *ibid.*.

⁸¹ This however already occurs in staff cases.

⁸² Art. 8 of the Decision, *ibid.*

The means of access include the supply of the documents by the Court (charging a fee for producing and sending copies is possible),⁸³ indication of the source of publication,⁸⁴ and consultation on the spot.⁸⁵ Unlike Regulation 1049/2001, the decision does not provide for the setting up of direct access in electronic form or through a register, and neither does it stipulate the obligation to draw up annual reports of the cases where access was refused.

While the publication of this decision is a welcome regulatory development capable of bringing the Court a step closer towards compliance with its transparency requirements as enshrined in Article 15(3) TFEU, it remains to be seen how the decision will be implemented in practice by the administrative apparatus of the Court. Critically, the decision fails to shed light on the very distinction between administrative and judicial tasks of the Court. As it will be illustrated in the next subsection, the line separating the two types of activities of the EU's judicial body is difficult to draw and blurs the normative content of the openness requirement applicable to this institution.

3.3 The blurred line separating judicial tasks from tasks with an administrative nature

In the absence of case law and legislation on this matter, how to distinguish between the Courts' administrative and judicial tasks remains an open, yet fundamental, question today. At the national level an ongoing debate exists as to what part of a court's activity is judicial and what part is not.⁸⁶ The debate revolves around whether judicial acts should be defined in a formal or a substantive way. From a formal point of view, any act issued by a Court might be considered judicial, whereas from a substantive point of view, this category includes only acts issued in order to ensure the respect of a certain legal order. While both these perspectives appear too vague and too large, it is considered that judicial tasks are those accomplished by a judge when solving disputes.⁸⁷ Thus, one way to settle the distinction between judicial and administrative is to consider activities performed by the Court in fulfilment of its main task to exercise judgment, such as hearing a case, deliberating, and issuing a judgment, as judicial activities that escape the transparency requirement of Article 15 TFEU. Nonetheless, the way in which administrative activities are carried out might affect the way in which the court exercises its judgment. For example, one may wonder whether part of the activity fulfilled by the Registry of the Court is judicial or administrative. Indeed, the Registry plays an important role in collecting briefings of cases, communicating with the parties and potential interveners. It creates thus an interface between parties, interveners and the Court, in the early stages of judicial proceedings.

Moreover, the way in which judgments are conveyed to the public, albeit administrative in nature, relates directly to the act of judgment. For example, the tasks of translating and publishing judgments of the Court are administrative tasks, in the charge of the Registrar and the Directorate General for Translation. However, both publication and translation relate directly to the content of texts that were issued by the Court in fulfilment of its task to carry out judgment, and hence are intrinsically linked to judicial tasks. Finally, even communicating the activity of the Court to the outside world through press releases, visits, or exchanges with foreign courts,

⁸³ Art. 11 of the Decision, *ibid.*

⁸⁴ Art. 10(2) of the Decision, *ibid.*

⁸⁵ Art. 10 of the Decision, *ibid.*

⁸⁶ See e.g. on French law Bandrac, "De l'acte juridictionnel et de ceux des actes du juge qui ne le sont pas", in *Le Juge entre Deux Millénaires. Mélanges Offerts à Pierre Drat* (Daloz, 2000), p. 171-183; on American law see Schwartz, "The other things that courts do", 28 *UCLA L. Rev.* (1980-1981), 438 et seq.

⁸⁷ Terré, *Introduction Générale au Droit* (Daloz, 2009), p. 598.

while administrative in nature at first glance, relate to communicating the way in which judicial tasks are fulfilled.

The situations described above concern functions carried out by bodies that are part of the administrative structure of the Court, such as the Registry and the Directorate General for Translation, the Press and Information Service and the Protocol and Visits Directorate. Other tasks are exercised directly by Court members, such as assigning the case to a certain Judge Rapporteur, a prerogative of the President of each jurisdiction.⁸⁸ While this task is more closely related to the judicial functions than those previously described, it does not have the same nature as other judicial functions such as hearing or deliberating a case. It also has a different nature from the task of assigning cases to formations of the Court,⁸⁹ done upon a proposal of the Judge Rapporteur, who undertakes a preliminary assessment of the case in order to determine *inter alia* whether it is “difficult or important enough” to be assigned to the Grand Chamber.⁹⁰ The decision on assigning cases to a certain formation is taken during the weekly general meeting, whose proceedings – as previously discussed – are not (and cannot be) open to the public.⁹¹ What should one make of an authorization request introduced to the weekly general meeting by a Member of the Court to engage in an external activity (e.g. teaching, public speaking, editorial meeting, etc)? Although this document does not seem *prima facie* to relate to the judicial activity of the Court, the rationale for this authorization procedure can be found in the need to protect the independence of the institution. The President and the members of the Court gathered in the weekly general meeting are expected to assess whether that particular activity involving an individual member may threaten the independence of the Court.

This brief examination demonstrates that determining which activities belong to the judicial and which belong to the administrative task is a difficult enterprise. Despite these difficulties, it is possible to advance a criterion that could enable the interpreter to distinguish the Court’s output stemming from the exercise of its judicial function from that related to its administrative tasks. In our view, only those activities and documents that belong to the process, being a direct expression of a court’s judicial activity, should escape the principle of access to documents. Thus, on this basis, while the reading and publication of a judgment are part of the process, its press release, which may in turn be circulated through a tweet, is not and therefore does not deserve protection.

In any event, when called to settle this issue, the analysis and the conclusions drawn by the EU Courts will most certainly reflect the judgement of their members as to the level of openness and transparency to which their judicial activity is subject. Our survey among several judges of the CJ gathered a very diverse set of opinions on this point. Given the *exceptio est strictissimae interpretationis* principle, the question that the Court will be called upon to answer concerns the object of the exception introduced by Article 15(3)(4). First and foremost, the language employed refers only to access to documents, and does not exempt the Court from conducting its “work as openly as possible” – as provided for in the first paragraph of the same Article. Thus, similar to all other EU institutions, the EU Courts have to make sure to exercise all their activities in a transparent fashion, and also to establish an active policy of reaching out and

⁸⁸ Similarly, one may refer to the task of assigning a case deserving the preparation of an Opinion to an Advocate General, a prerogative of the First Advocate General. See Art. 16 of the Rules of Procedure of the CJ.

⁸⁹ Art. 60 of the Rules of Procedure of the CJ.

⁹⁰ Art. 59 of the Rules of Procedure of the CJ.

⁹¹ It is of interest to observe that minutes are drawn up during this meeting by the Registrar or, in his absence, by the most junior judge. See Art. 26 of the CJ Rules of Procedure.

informing individuals of their work. Second, since the essence of the Courts' activities consists in handling proceedings and their related documents, the non-administrative category, although residual, is clearly more significant in size and consists in activities that may be qualified as judicial as they relate to Court proceedings.

With this in mind, the next section turns to assessing the openness of the bulk of the activity of the EU Courts: their tasks to hear and instruct cases as well as to render judgments.

4. Assessing the openness of the judicial activity of the Court

The views expressed in the literature with regard to the nature and degree of openness of the judicial activity of the EU Courts are mixed. On the one hand, any form of “openness talk” at the CJEU appears taboo, because it arguably interferes with carrying out the act of justice and is immediately perceived as a potential threat to the principle of secrecy of deliberations.⁹² On the other hand, some view more favourably this type of discussion, on the ground that the debates of improving openness should relate not only to the Commission and the Council but also to the European judicial institution.⁹³ Rasmussen warned that embracing such a policy of openness is paradoxical since the activities of the Court are inherently non-transparent. In this vein, he drew the reader's attention to the procedure of appointing judges traditionally carried out behind closed doors, to the lack of dissenting opinions, and to the potentially difficult cooperation with national courts (due to increasing backlogs of cases).⁹⁴ These concerns have partly been addressed recently by amending the judges' appointment procedure,⁹⁵ as well as by reducing the time of processing preliminary references. Lasser gives a more nuanced account regarding the degree of openness of the European Courts' activities, while focusing on a different angle: judicial reasoning.⁹⁶ He argues that, even in the absence of dissenting opinions, the judgments of the Court can engage with the arguments presented by the Advocates General in their Opinions. This practice fosters dialogue, insofar as those opinions are published and accessible to the citizens.⁹⁷ Along similar lines, it has been argued that Opinions of Advocates General provide a valuable bridge between the judicial deliberations of the Court and the outside, thus contributing

⁹² See Art. 2 of the Statute, Arts. 4 and 32 of the CJ Rules of Procedure, Art. 4 of the GC Rules of Procedure, and Art. 3 of the CST Rules of Procedure.

⁹³ Rasmussen, op. cit. *supra* note 23, 1661 et seq.

⁹⁴ Ibid., 1678-1683.

⁹⁵ On this reform and the establishment of the expert panel provided for by Art. 255 TFEU, see Mance, “The Composition of the European Court of Justice”, text of a talk given to the UK Association for European Law, 19 Oct. 2011; Vesterdorf, “La nomination des juges de la Cour de Justice”, 47 CDE (2012), 610 et seq; Sauvé, “Le rôle du comité 255 dans la sélection du juge de l'Union”, in Rosas, Levits and Bot (Eds.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (Asser Press/Springer, 2013), at pp. 102-103. On the transparency of the appointment of the EU Courts' members following the establishment of Art. 255 TFEU's panel, see Alemanno, “Access to information versus privacy in the process of selection: Is there reasonable middle ground?”, in Bobek (Ed.), *Selecting Europe's Judges – A Critical Appraisal of Appointment Processes to the European Courts* (OUP, forthcoming, 2014).

⁹⁶ On judicial reasoning as part of judicial legitimation, see von Bogdandy and Venzke, op. cit. *supra* note 53, p. 15 et seq.

⁹⁷ On “discursive legitimacy”, see Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP, 2004).

not only to institutional legitimacy of the Court but also to the substantive and authoritative legitimacy of a particular decision in the eyes of the public.⁹⁸

In line with the research question expressed at the outset, this article focuses on the institutional side of openness, leaving to further research the impact that openness might have on judicial reasoning. Indeed, we start from the premise that in order to be able to ascertain whether the legal reasoning of the Court is clear or cryptic, one needs first and foremost to have access to the material that would enable such assessment. In this connection, a growing public sensitivity to judicial openness can be observed at the EU level. Recently, several legal practitioners complained to the Committee on Legal Affairs of the European Parliament that “it is often impossible to follow the process by which EU case law is made because documents of the Court of Justice of the European Union are not accessible.”⁹⁹

These concerns prompted a study from the Citizen’s Rights and Constitutional Affairs Department of the European Parliament (hereinafter the “EP study”) on the national practices with regard to the accessibility of court documents. The study aims at addressing “the right of access to court documents relating to the judicial functioning of the judiciary”.¹⁰⁰ The EP study is timely, and includes some interesting suggestions. It rightfully points out that the Court might learn from the practices endorsed by other judicial institutions with regard to openness. However, the study does not undertake a comparative analysis of judicial institutions, as this appears a monumental task.¹⁰¹ Other studies reveal a vast array of experiences at the national level in the EU, varying from systems that exempt courts from transparency obligations (such as for instance Spain, Germany and the Slovak Republic) to more open systems (such as UK and Poland among others).¹⁰² In the absence of a common denominator, it was argued that the EU Court can become a transparency “pioneer”,¹⁰³ and that the EU should not follow those national judicial traditions of “aloofness and remoteness from the world outside courtrooms”,¹⁰⁴ especially given the current mission to ensure open government throughout Europe.

Access to court files appears central to the suggestions formulated in the EP study. Thus, all documents pertaining to court proceedings are treated together by the study; little attention is paid to matters such as the physical access to Court hearings and publication of judgments, while the massive problems raised by linguistic diversity are overlooked. We suggest a broader and more structured analytical framework, constructed according to the main phases of the procedure taking place in front of the EU Courts.¹⁰⁵ Hence, one can distinguish between input openness, related to the written stage of the procedure; throughput openness, related to the oral phase and

⁹⁸ Hinarejos, “Social legitimacy and the Court of Justice of the EU. Some reflections on the role of the Advocate General”, 15 CYELS (2012), 615-634.

⁹⁹ See Study of the European Parliament, National practices with regard to the accessibility of court documents, April 2013, PE 474.406, p.7.

¹⁰⁰ Ibid., 18.

¹⁰¹ Ibid., 10.

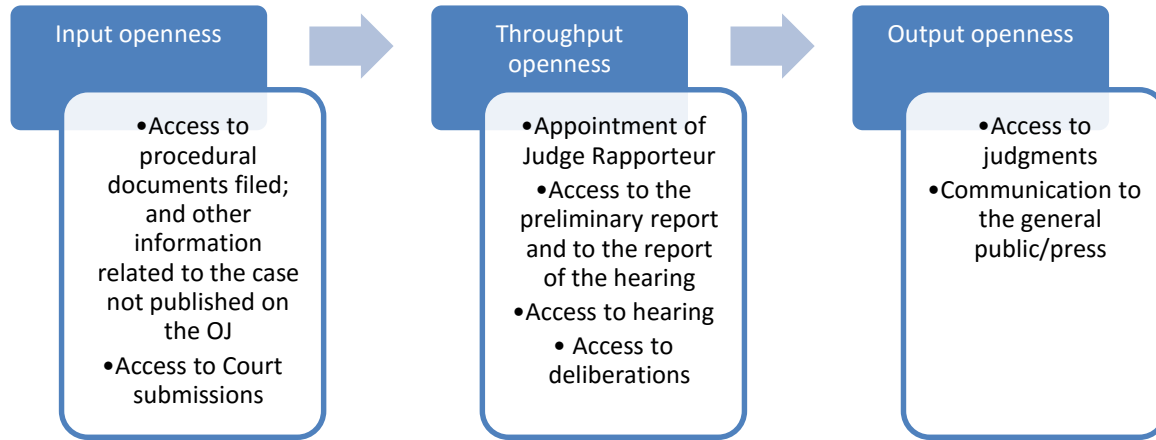
¹⁰² Musar, “Access to court records and FOIA as legal basis – experience of Slovenia”, available online at <www.ip-rs.si/fileadmin/user_upload/Pdf/konference/Nova_Zelandija_predavanja1.pdf> (last visited 15 Nov. 2013.) See also the Opinion of A.G. Maduro in *API*, cited *supra* note 27.

¹⁰³ Study of the EP on the accessibility of court documents, cited *supra* note 99, p. 8.

¹⁰⁴ Rasmussen, op. cit. *supra* note 23, 1661 et seq, at 1667.

¹⁰⁵ This parallels the methodology used by Brandsma, Curtin and Meijer in their evaluation of transparency of the comitology processes, see Brandsma, Curtin and Meijer, op. cit. *supra* note 42, at 826.

the Courts' deliberations;¹⁰⁶ and output openness, related to the delivery of judgment and subsequent diffusion. Given that the legal procedure in front of the EU Courts is the backbone of the EU judicial body's functioning, the conclusions drawn in this regard will allow us to gain an overview of the overall level of openness of the CJEU as both an administration and a jurisdiction.



4.1 Input openness

Input openness refers to the initial phase of the procedure before the EU Courts and essentially coincides with the written part, a phase during which a significant quantity of information and documents are generated both by the parties to a dispute and by the courts themselves. The assessment covers the period from the moment of the registration of the application until the opening of the oral procedure. We argue that EU Courts should make available clearer information concerning the existence of a case and that, in principle, access to the parties' submissions should be granted to third party applicants.

4.1.1 Access to information related to the existence of a case

Following registration, a notice is published in the Official Journal containing the date of registration of an application initiating proceedings, the names of the parties, the subject-matter of the proceedings, the form of order sought by the applicant, and a summary of the pleas in law and of the main supporting arguments. In case of a preliminary ruling, it also contains the identity of the referring court and of the parties in the main proceedings, as well as the questions asked.¹⁰⁷ It is commendable that the final version of the new rules of procedure of the Court discarded the initial proposal according to which the summary of the pleas in law and the supporting arguments would be published on the O.J. only "where appropriate."¹⁰⁸ Indeed, as is illustrated below, this publication represents the only information made available to the general public about pending cases.¹⁰⁹

¹⁰⁶ According to Art. 20(1) of the CJEU Statute, the procedure consists of a written part and an oral part. See also Art. 53 of the CJ Rules of Procedure, Chs. 1 and 2 of Title 2 of the CST Rules of Procedure and of the GC Rules of Procedure.

¹⁰⁷ Art. 21 (4) of CJ Rules of Procedure and Art. 24 (6) of the GC Rules of Procedure.

¹⁰⁸ Art. 21 (4) of the Draft CJ Rules of Procedure, 25 May 2011.

¹⁰⁹ On the contrary, the EFTA Court publishes the case details on its website. See <www.eftacourt.int/cases/> (last visited 15 Nov. 2013).

One of the most obvious limitations to input transparency occurs in references for preliminary rulings. The original requests from national courts are not – and never were – published in all the official languages of the EU. Although the original version of the preliminary reference is communicated by the Court to all Member States accompanied by a translation into the official language of the State to which it is addressed, these documents are never disclosed to the public.¹¹⁰ What is more, on account of the length of the national court's decision, only a translated summary of the decision must be communicated to the States.¹¹¹ This has become the practice of the Court, under the old Article 104(1) of the Rules of Procedure, when in 2005 – in the aftermath of the 2004 accession – the EU moved from 11 to 20 official languages.¹¹² A summary may be established as soon as a request for a preliminary ruling is longer than 20 pages.¹¹³ In 2012, out of 403 preliminary references, 67 summaries were established.¹¹⁴

These practices concerning preliminary rulings are motivated by the need to respect the Member States' autonomy in determining how their jurisdictions may co-operate with the CJEU. In turn these practices reflect different degrees of judicial transparency. At the same time, they appear necessary in order to enable the Court to dispose of the case within a reasonable period of time. Nonetheless, these practices may be problematic for several reasons. A good flow of information between the CJEU and the national courts would necessitate much more than serving on the Member States the original request for preliminary ruling or the summary thereof. Indeed, as noted in the literature, national courts could benefit from having access to the original order requesting the preliminary ruling as well as to the final decision of the national courts following the CJEU judgment.¹¹⁵ Furthermore, preventing disclosure of the original request precludes the observer from understanding why the Court has declared a request inadmissible. More fundamentally, the lack of access to the original request prevents understanding the gap between the judicial context characterizing the national court's decision to refer and the final judgment of the Court.

These transparency deficiencies are to a certain extent palliated by other bodies than the CJEU.¹¹⁶ Thus, some courts of the Member States publish a compilation of preliminary references from various Member States translated into their own language,¹¹⁷ while judicial networks created data bases sharing this type of case law.¹¹⁸ There are even companies compiling such data bases and providing access thereto for professionals, in exchange for fees.¹¹⁹

¹¹⁰ Contrary to what one might expect, this communication does not occur immediately after the lodging of the request, but on average after 4-6 weeks. Interview with CJ official, 14 Jan. 2013.

¹¹¹ Art. 98 of the CJ Rules of Procedure.

¹¹² This provision was part of the institutional arrangements related to the enlargement and has now become Art. 98 of the CJ Rules of Procedure.

¹¹³ Originally, the threshold triggering the preparation of the summary was 25 pages. One page according to the Court contains a maximum of 1500 characters.

¹¹⁴ Interview with CJ official, 14 Jan. 2013.

¹¹⁵ Bobek, op. cit. *supra* note 54.

¹¹⁶ Ibid.

¹¹⁷ This is the case in *inter alia* the Netherlands, the Czech Republic, Poland, Romania and Portugal. While the Portuguese *Supremo Tribunal de Justiça* has been doing this since 2010, its website only lists the questions referred, and it does not offer translations of the whole preliminary reference. See <www.stj.pt/jurisprudencia/tjue> (last visited 15 Nov. 2013). Anecdotal evidence mentioned by the EP study (p. 54) shows that lawyers navigate foreign courts websites in order to obtain information on preliminary rulings by using various translation applications (which may be more or less accurate).

¹¹⁸ JuriFast (<www.juradmin.eu/fr/jurisprudence/jurifast_fr.html> (last visited 15 Nov. 2013), a data base set by the Association of Councils of State and the Supreme Administrative Jurisdictions.

¹¹⁹ E.g. CASELEX, <www.caselex.com/> (last visited 15 Nov. 2013).

Finally, the CJEU established, through its Research and Documentation Service, Dec.nat, a collection of the case law of the courts and tribunals of the Member States concerning European Union law.¹²⁰ This initiative is praiseworthy as it facilitates the dissemination of information about EU law enforcement. Besides the necessity to update the database more frequently,¹²¹ a welcome development would be ensuring a user-friendly interface that would link preliminary ruling judgments issued by the Court to the relevant national decisions in particular cases.¹²²

4.1.2 Access to Court submissions

Procedural documents and supporting items filed in the EU Courts by the parties are not published, but only entered in the order of submission in a register.¹²³ Under the Rules of Procedure of EU Courts, third parties are free to consult this register and may obtain copies or extracts for a fee. However, the same rules establish different triggers enabling third parties to gain access to register entries. At the CJ, “anyone” may consult the register;¹²⁴ at the GC, “having an interest” in consulting the entries may suffice;¹²⁵ while “a duly substantiated interest” is needed for persons desiring to have access to the register of the CST.¹²⁶ To a certain extent, this differentiation could be justified at the level of the CST, given the inherent nature of the cases dealt with by this specialized court, pertaining to private matters related to EU officials’ careers. It might equally be argued that cases before the General Court require greater direct implication for the parties than before the Court of Justice, which settles mostly points of legal interpretation. However, we find the restrictions at the CST and the GC level disproportionate, as protecting private interests in cases might be done in a less restrictive manner by the Courts themselves, when classifying certain information.

Following registration, procedural documents are kept in the case file, together with decisions taken in the case, minutes and reports of hearings, notices and other documents of correspondence.¹²⁷ Only the parties to the proceedings and the interveners enjoy access to the case file¹²⁸ since they are served with the pleadings and other documents related to the case by the Registries.¹²⁹ The situation is different with regard to the general public, since third parties do not enjoy under the current legislative framework a right of access to the case file, and in particular to the procedural documents that the parties filed with the registries, even when the case is closed. Indeed, Article 20 of the Statute provides that the documents belonging to the case

¹²⁰ See the Dec.nat database, containing over 26,000 national decisions at <www.juradmin.eu/en/jurisprudence/jurisprudence_en.lasso> (last visited 15 Nov. 2013).

¹²¹ The most recent update is from December 2012. (information valid on 15 Nov. 2013).

¹²² As pointed out by the EP study, creating a database of summaries of preliminary ruling cases might be a good solution. However, the suggestion to have the database only in French clashes with the principle of multilingualism. (EP study, cited *supra* note 99, at p. 58.)

¹²³ Art. 21(1) of the CJ Rules of Procedure, Art. 24(1) of the GC Rules of Procedure, and Art. 20(1) of the CST Rules of Procedure.

¹²⁴ Art. 22(1) of the CJ Rules of Procedure.

¹²⁵ Art. 24(5) of the GC Rules of Procedure.

¹²⁶ Art. 24(5) of the CST Rules of Procedure.

¹²⁷ Art. 2 of the Instructions to the CJ Registrar, Art. 5(1) of the Instructions to the GC Registrar; Art. 6(1) of the Instructions to the CST Registrar.

¹²⁸ The Instructions to the Registrar of the General Court (in Arts. 5 and 6) detail more than those of the CJ the way in which Court files can be accessed.

¹²⁹ See Art. 20 of the Statute as well as Art. 48 of the CJ Rules of Procedure and Art. 3(3) of the Instructions to the Registrar of the Court of Justice; Art. 100 of the GC Rules of Procedure and Art. 10 of the Instructions to the Registrar of the General Court; Art. 99 of the CST Rules of Procedure and Art. 10 of the Instructions to the Registrar of the CST.

file are communicated to the parties and to the institutions of the Union whose decisions are in dispute, and makes no mention of third party communications. In line with Article 15(3) TFEU, the documents belonging to the case file – having a non-administrative nature – are legally exempt from the duty of disclosure, and neither do they form the object of the recent decision of the Court on access to documents held in the exercise of administrative tasks. No third-party right of access to the case file is expressly recognized by the rules concerning the CJ, although this issue is currently under discussion.¹³⁰ At the GC level, third parties can have access to the case file on express authorization by the President or, if the case is still pending, by the President of the formation of the Court, but only after the parties have been heard.¹³¹ At the CST, such authorization is a prerogative of the President.¹³² In both situations, the third party asking for access to a case file must justify a legitimate interest in inspecting the file.¹³³ In conclusion, a combined reading of Article 15(3) TFEU, Article 20 of the Statute and the Instructions to the Registrar suggests that, as a rule, the case file is not accessible to third parties.

Third parties may ask directly the parties of the proceeding to have access to the documents relevant to the dispute.¹³⁴ Indeed, in the absence of express legislative indication, parties to a proceeding are in principle free to disclose their written submissions.¹³⁵ This could be translated into an obligation for the EU institutions to disclose their written submissions in cases before the Court, given the principle of free access to EU documents provided for in Regulation 1049/2001. However, the same regulation recognizes that the refusal to grant access to institutional pleadings is justified if such access would undermine the protection of court proceedings, unless there is an overriding public interest in the disclosure.¹³⁶

This exception was discussed in *API*, where third party access to documents in closed and pending cases was at issue. The CJ held that the disclosure of institutional pleadings in pending cases should be presumed as undermining the protection of judicial proceedings.¹³⁷ As a result of this judgment, EU institutions are under no obligation to examine on a case-by-case basis each request before denying access to their pleadings in cases that are not yet decided, even if the hearings have already taken place. Conversely, this presumption ceases to exist once a judgment has been issued in a case. While these documents are still protected under Article 4(2) of Regulation 1049,¹³⁸ the institutions concerned are required to undertake a case-by-case analysis for each disclosure request.

API illustrates the difficulties faced by third parties when trying to access documents pertaining to the written phase of Court proceedings, difficulties that appear paramount in pending cases. Disclosure would arguably render meaningless the possibility to hold proceedings *in camera*¹³⁹ and jeopardize the principle of equality of arms, exposing the arguments of the

¹³⁰ Communication with Court of Justice Registry official, 12/06/2013.

¹³¹ Art. 5(8) Instructions to the Registrar of GC.

¹³² Art. 20 of the CST Rules of Procedure.

¹³³ Art. 5(8) Instructions to the Registrar of GC and Art. 20 of the CST Rules of Procedure.

¹³⁴ Judgment in Case T-36/04, *API v. Commission*, [2007] ECR II-3201, paras. 86-89.

¹³⁵ Order in Case C-376/98, *Germany v. Parliament and Council*, [2000] ECR I-2247, para 10.

¹³⁶ Art. 4(2) of the Regulation.

¹³⁷ *API*, cited *supra* note 27, para 94.

¹³⁸ In line with Art. 15(3) TFEU, the Commission proposal revising Regulation 1049 maintained the Art. 4(2) exception with regard to documents that do not fall within the exercise of the Court's administrative tasks. See Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission document, COM(2008)0229 final.

¹³⁹ Art. 31 of the Statute; Art. 79 of the CJ Rules of Procedure; Art. 57 of the GC Rules of Procedure.

institutions to public debate unlike those of their opponents.¹⁴⁰ Finally, it might place EU Courts under “external pressure, albeit only in the perception of the public, and would disrupt the serenity of the proceedings.”¹⁴¹ Yet such justifications fade away if one takes into consideration other international and domestic experiences. Thus, under Article 40(2) ECHR, the Strasbourg court allows in principle public access to files in both pending and closed cases¹⁴² and imposes a similar standard on its member’s judiciaries.¹⁴³ Several international and domestic courts, such as the US federal judiciary, share this practice, and some authors argue that such access might increase legal certainty.¹⁴⁴

The above experiences suggest that granting access to submissions does not automatically threaten the serenity of judicial proceedings. Critically, it is rather up to the actual discretion enjoyed by parties to a dispute to disclose their written pleadings that appears capable of encroaching on the protection of judicial proceedings. In response to such a concern, Advocate General Maduro rightfully pointed out in *API* that the Court should be the master of its own case, since it is the only one in a position to determine whether releasing documents could have a negative impact on the proceedings.¹⁴⁵ This solution would be beneficial not only for the parties, but also for the European institutions, which would be alleviated of the task of analysing disclosure requests concerning documents related to court proceedings. Yet, the Court in *API* did not endorse this approach.¹⁴⁶

Critically, such a solution does not stand at odds with the national regimes of access to court files. Indeed, Advocate General Maduro could not distil from the common legal traditions of the EU Member States a principle requiring public access to the file in pending cases, while in the majority of the Member States the courts had the discretion to grant such access. Easier access to case files at the level of the EU Courts might entice quicker changes at the national level too. Indeed, the common traditions of the Member States do not actually require confidentiality of the case file, and Sweden and Finland already recognize a right of access to documents in pending cases.¹⁴⁷ Nonetheless, given the diverse traditions at the national level,¹⁴⁸ we believe that no abrupt change should occur solely by judicial intervention with regard to the policy of granting access to files in pending cases. Therefore, a principle of full access to files in pending cases should develop incrementally, mirroring an eventual evolution of the national legal systems towards more openness of judicial activity.

With regard to closed cases, access to the file appears easier. However, it is still dependent on either the existence of a “legitimate interest” when requiring access to the case file directly from the EU Courts, or on the will of the parties to a case – albeit within the *API* limits in cases involving the European institutions. Nevertheless, even if public access to the case file

¹⁴⁰ *API*, cited *supra* note 27, paras. 85 et seq.

¹⁴¹ *Ibid.*, para 93.

¹⁴² The requests can be submitted online through the webpage appform.echr.coe.int/echrrequest/request.aspx?lang=en&occupation=T5_4&request=T5_2 (last visited 15 Nov. 2013).

¹⁴³ See e.g. *Társaság a Szabadságjogokért v. Hungary*, judgment of 14 Apr. 2009, App. No. 37374/05, where the ECtHR held that failure to grant access to submissions in a case before the Hungarian Constitutional Court amounted to a violation of Art. 10 ECHR.

¹⁴⁴ Anderson, op. cit. *supra* note 22, 811 et seq.

¹⁴⁵ Opinion of A.G. Maduro in *API*, cited *supra* note 27, para 14.

¹⁴⁶ *API*, cited *supra* note 27, para 156.

¹⁴⁷ Opinion of A.G. Maduro in *API*, cited *supra* note 27, para 14.

¹⁴⁸ For an overview, see Study of the European Parliament, National practices with regard to the accessibility of court documents, April 2013, PE 474.406.

in closed cases should be recognized, this will not automatically guarantee actual access to these documents, since they are drawn up in the language of the case¹⁴⁹ and generally not translated into other EU official languages. This is because the documents belonging to a case file are required to be translated only into the language of procedure; sometimes, by reason of the length of the document, only extracts are translated. Although the new CJ Rules of Procedure enable the Court to establish a maximum length of the written pleadings,¹⁵⁰ given the important volume of translations already in existence at the level of the Court, making all files available in all 24 official languages would be an almost impossible task that would increase tremendously both the costs and duration of proceedings.

In this regard, input transparency could be improved by following the line suggested by Advocate General Maduro in *API*: the Court should be the one to decide whether or not to grant free access to the case file. Two possibilities can be envisaged in this case. First, the Court could deal with requests for access on a case-by-case basis. In this regard, the Court could issue another decision setting a procedures for access to judicial documents, as it did with the administrative ones. Second, free access to the case file could be the rule, with the possibility for the Court to classify certain files if secrecy needs to be observed (e.g. for the cases held *in camera*).¹⁵¹ In these circumstances, individuals could be allowed free access to a “public” part of the Court records (containing unclassified case files). In our view, this second solution is to be preferred from a transparency perspective. Indeed, it could be beneficial not only for the lawyer in search of arguments that would help their clients in future or pending cases and the national judge facing a similar case, but it would allow large scale studies to be conducted by academics and would create the premises to better understand European case law and reflect on the work of the CJEU as an institution of European integration.¹⁵² An argument has also been made that more accessibility to Court documents, by enabling the public to scrutinize the quality of the submissions, could render the market for legal services more transparent.¹⁵³ This will of course create additional financial and administrative burdens, as many of these documents would need to be translated in the official languages of the Union. Ensuring a fair balance between the need for transparency and the costs of transparency might indeed entail limitations, such as for instance making documents available only in certain linguistic versions.¹⁵⁴ From a logistical point of view, the EP study makes the suggestion that access could be ensured through the e-Curia application, which already allows the exchange of documents between the parties and the Court.¹⁵⁵

4.1.3. Evaluation

From the point of view of *distribution of information*, at the input level of the judicial process, the Court of Justice scores well concerning information about the existence of a case, with the

¹⁴⁹ Art. 38(1), CJ Rules of Procedure; Art. 35(3), GC Rules of Procedure.

¹⁵⁰ Art. 58 CJ Rules of Procedure. Similar the Instructions to the Parties by the GC provides for maximum length for the parties’ submissions.

¹⁵¹ A combination of both approaches could also be envisaged.

¹⁵² Vauchez, “The transnational politics of jurisprudence. Van Gend en Loos and the making of EU polity”, 16 ELJ (2010), 1-28.

¹⁵³ See, Lamadrid, “Sunshine Lawyering”, post published on 2 May 2013 on *Chillin’Competition*, available at <chillingcompetition.com/2013/05/02/sunshine-lawyering/> (last visited 15 Nov. 2013).

¹⁵⁴ Hopefully not limited to French (the internal working language of the Court); we argue that, due to current linguistic realities, translating the documents into English should be a must.

¹⁵⁵ The EP study, *supra* note 99, at p. 56.

notable caveat regarding information concerning the national proceedings in preliminary references. From the point of view of *access to information*, the Court fares quite well with regard to access to information entered in the register, yet it restricts the access to actual documents and pleadings submitted during the proceedings.

The challenges to input openness relate to both institutional capacity and legal ethos. Indeed, as seen above, ensuring translations in all languages of information regarding the existence of a case and of the detailed arguments of the parties is difficult. While the translation problem could potentially be solved allowing access to procedural documents in their original version, and leaving translations costs in the charge of those interested, this may lead the EU courts to depart from the respect from the principle of multilingualism.¹⁵⁶ In this context, we see that the specificities of the judicial mission entrusted to the CJEU involve important choices between core principles of law, such as the requirement to carry out justice in a prompt manner and the need for judicial openness.¹⁵⁷ Furthermore, as regards the access to pleadings in pending cases, we observe that the diverse legal traditions in Europe make it virtually impossible for the Court to ensure full open access to its procedural documents. Due to the Article 15 TFEU exception, complete transparency in this regard is not even envisaged under the current legal framework. In these circumstances, one step towards ensuring more openness in this regard is to allow public access to the Court records.

4.2 Throughput openness

Throughput openness relates to the oral phase of the proceeding. Although not of the same magnitude as in the input phase, a significant amount of information is generated by both the parties to the proceeding and the Courts also in this intermediate phase.

4.2.1 Access to the hearings

Publicity of oral hearings is guaranteed through the website of the Court. As expressly stated by the Statute and in accordance with Article 47 of the Charter of Fundamental Rights (CFR), access to the oral hearing is in principle public.¹⁵⁸ To make public access to hearings a reality, the website of the Court regularly publishes the judicial calendar, thus making available the dates of forthcoming hearings. Publicity of oral hearings and public access to the courtroom seem to ensure an adequate level of throughput openness *prima facie*. Of course, some restrictions are justifiable in those cases heard *in camera*.¹⁵⁹

However, attendance at a hearing and access to the information herewith exchanged presupposes physical presence, and therefore a trip to Luxembourg. This difficulty can be palliated in a number of ways. The current rules provide for the possibility to consult, under very limited circumstances, the minutes of the hearing or to listen to the soundtrack thereto. Minutes of the hearings are drawn by the Registrar and constitute the official record.¹⁶⁰ The parties to the case and third parties can inspect the minutes at the registry and obtain copies – an activity that

¹⁵⁶ As enshrined in Arts. 36 and 38(2) of the CJ Rules of Procedures, Arts. 35 and 36 of the GC Rules of Procedure.

¹⁵⁷ See Gaudissart, “Le regime et la pratique linguistiques de la Cour de Justice”, in Hanf, Malacek and Muir, *Langues et construction européenne* (PIE Peter Lang, 2007), pp. 150-151.

¹⁵⁸ Art. 47 of the Charter of Fundamental Rights and restated in Art. 31 of the Statute.

¹⁵⁹ Art. 31 of the Statute; Art. 79 Rules of Procedure of the CJ, Art. 57 Rules of Procedure of the GC; Art. 51 Rules of Procedure of the CST.

¹⁶⁰ Art. 33 Statute, Art. 84 Rules of Procedure of the CJ, Art. 63 Rules of Procedure of the GC; Art. 53 Rules of Procedure of the CST.

again requires considerable logistical efforts on the part of those interested, if they are not based in Luxembourg. The new Rules of Procedure of the CJ provide for the first time the possibility to authorize a party or an interested person who has participated in the proceedings to listen to the recording of the hearing in the language used by the speaker during that hearing.¹⁶¹

This emerges as a clear improvement from the point of view of transparency. Yet the Court could go further than this, by *inter alia* broadcasting the hearing online and making available the minutes. Indeed, as pointed out in the literature, ensuring open court can occur naturally by allowing public access to the courtroom, but, most importantly, it requires sometimes the intervention of the public authority. It thus implies certain requirements that the architecture of the courthouse does not always accommodate. It requires sufficient space for the public to participate effectively and to allow the press to report trials, film and broadcast court sessions.¹⁶² Broadcasting sessions could be done at a very low cost since video equipment already exists in all courtrooms¹⁶³ and minutes are already available. A disclaimer excluding all legal consequences stemming from the sudden unavailability of these forms of support should be enough to limit any possible claims. Such course of action would also be capable of solving an urgent logistical problem faced by the Court: it would allow landmark cases to be watched by many people at the same time, avoiding delicate situations such as that raised during the hearings in *Microsoft*¹⁶⁴ and the *People's Mojahedin Organization of Iran*.¹⁶⁵ In these cases, the sudden afflux of a record number of visitors to the Court in the morning of the hearings put the Court under great pressure.¹⁶⁶ In the meantime, the Court's reluctance to facilitate the attendance of the hearing is creating a market for specialized media outlets that can afford to pay a journalist to attend hearings and provide summaries online to their subscribers.¹⁶⁷

Initiatives regarding the broadcasting of hearings were successfully undertaken by the ECtHR, which has made webcasts available online since 2007.¹⁶⁸ The website of the EFTA court displays user-friendly links to the available recordings of various judgments and press statements.¹⁶⁹ At the domestic level, practices with regard to the filming of court cases vary and tend not to face the burden of multilingualism. They are generally not easily accepted because they are argued to interfere with the act of justice,¹⁷⁰ and might not be understood by the average citizen.¹⁷¹ However, given the high importance of the media nowadays, the reluctance to broadcast court trials cannot be justified any longer.¹⁷² In England, for example, the proceedings

¹⁶¹ Art. 85 Rules of Procedure of CJ.

¹⁶² Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law*, Routledge (2011), pp. 87-106.

¹⁶³ Interview with Officials of the Press and Information Unit, Court of Justice of the European Union, 18 Jan. 2012.

¹⁶⁴ Case T-201/04, *Microsoft v. Commission*, [2007] ECR II-3601.

¹⁶⁵ Case T-284/08, *People's Mojahedin Organization of Iran v. Council of the European Union*, [2008] ECR II-3487; Case C-27/09, *French Republic v. People's Mojahedin Organization of Iran*, judgment of 21 Dec. 2011, nyr.

¹⁶⁶ Interview with officials of the Press and Information Unit, CJEU, 18 Jan. 2012.

¹⁶⁷ See e.g. m-Lex, market intelligence.

¹⁶⁸ Under Irish Aid financing as confirmed by the logo attached to each webcast on the site <www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/> (last visited 15 Nov. 2013); see also Justice Hedigan, "The European Court of Human Rights: Yesterday, Today and Tomorrow", 12 *German Law Journal* (2011), 1716-1729, at 1727, available at <www.germanlawjournal.com/index.php?pageID=11&artID=1381> (last visited 15 Nov. 2013).

¹⁶⁹ <www.eftacourt.int/press-publications/news/2013/browse/1/> (last visited 15 Nov. 2013).

¹⁷⁰ Mulcahy, op. cit. *supra* note 162, p. 105.

¹⁷¹ According to Justice Sonia Sotomayor of the US Supreme Court, interview by Charlie Rose, 6 Feb. 2013, available at <www.charlierose.com/view/interview/12765> (last visited 15 Nov. 2013).

¹⁷² Mulcahy, op. cit. *supra* note 162, p. 105.

of the Supreme Court are broadcast live on the Internet page of Sky News,¹⁷³ even though they are not available outside live transmissions. The same court has a YouTube page showing summaries of hearings and a Twitter account followed by over 35,000 persons.¹⁷⁴ Furthermore, starting in October 2013 filming is allowed in the appeal courts of England and Wales, and judges receive training before appearing on camera.¹⁷⁵ The Brazilian Supreme Federal Tribunal administers a YouTube page where complete recordings of hearings are available at all times,¹⁷⁶ while in the US the debate on televising the US Supreme Court proceedings is ongoing.¹⁷⁷ Thus, in an era characterized by social media and a 24-hour news cycle, it is commendable that the Court of Justice of the European Union has recently opened a Twitter account,¹⁷⁸ and aims at sending “one to three Tweets per week ... concerning decisions and certain institutional events.”¹⁷⁹

4.2.2 Access to the report for the hearing

Throughput transparency has historically been ensured by the availability of the report for the hearing, an official document prepared by the Judge Rapporteur summing up the arguments of the parties to the dispute.¹⁸⁰ In this regard, the CJEU used to fare higher from a judicial transparency point of view than national legal orders that in most cases do not prepare such reports and make them available. The report used to be circulated to the parties before the hearing and made accessible on the day of the hearing to all interested parties in attendance. Although the public could have access to this document in the language of the case and upon request,¹⁸¹ the policy of systematic publication of the report rendered throughput transparency more tangible. This document traditionally offered the parties to a dispute the possibility to verify whether the judges had correctly understood their arguments (given that judges generally read a translation, and not the original submission). It equally gave the general public an opportunity to grasp the implications of a pending case. If measured against these dual objectives, the recent decision enshrined in the new rules of procedure for the Court to abandon the preparation of the report of the hearing is regrettable.¹⁸² This occurred presumably due to the significant amount of resources required not only to draft but also translate this document whose “added value” has been severely questioned over the years.¹⁸³ The GC has not abandoned – at least not yet – the report for the hearing, which is still made accessible on the day of the hearing

¹⁷³ See <news.sky.com/info/supreme-court> (last visited 15 Nov. 2013).

¹⁷⁴ As of 19/03/2013.

¹⁷⁵ Owen Bowcott, “TV cameras to be allowed into court of appeal”, *The Guardian*, 30 Jan. 2013.

¹⁷⁶ See <www.youtube.com/user/STF/videos?view=0> (last visited 15 Nov. 2013).

¹⁷⁷ See <www.c-span.org/Events/Bill-Would-Allow-Cameras-in-the-Supreme-Court/10737428169/> (last visited 15 Nov. 2013).

¹⁷⁸ The CJEU came second in this enterprise, after the ECtHR, which introduced Twitter for its communications in March 2013 (@ECHR_Press). For some background on how the CJEU embraced social media, see Alemanno, “Let’s Make the EU Courts Tweet”, post available at <www.albertoalemanno.eu/articles/let’s-make-the-european-courts-tweet> (last visited 15 Nov. 2013).

¹⁷⁹ <curia.europa.eu/jcms/jcms/P_91153/> (last visited 15 Nov. 2013).

¹⁸⁰ See Art. 20(4) of the Statute.

¹⁸¹ Communication with Court of Justice Registry official, 12 Feb. 2013.

¹⁸² The EFTA Court, however, prepares a Report for the Hearing, drawn up by the Judge Rapporteur. It is made available to the public on the Court’s website and on the day of the hearing to all individuals present in the courtroom. Before finalizing the Report the parties are invited to verify whether the basic arguments have been correctly summarized and whether the report adequately reflects their views as expressed in the pleadings. See, in particular, C b. of the EFTA Court’s Guidance for Counsel.

¹⁸³ Art. 29 of the old Rules of Procedure of CJ.

to all individuals present in the courtroom, and can also be obtained from the Press and Information Service.¹⁸⁴

4.2.3 Access to the preliminary report

Another significant set of information is contained in the preliminary report.¹⁸⁵ Unlike the report for the hearing, this is not an official document, but a mere preparatory document established by the Judge Rapporteur once the written phase is completed. This document is presented and discussed in the weekly general meeting of the CJ and the regular meetings of the GC and CST and represents the only opportunity for all members to examine the importance of the case. It typically contains a set of recommendations about how to handle the subsequent instruction of the case: a proposal for the formation to which the case should be assigned, various recommendations regarding the necessity to organize a preparatory inquiry or other preparatory measures, regarding whether to dispense with a hearing or, at the CJ, an opinion of the Advocate General. Similar to any preparatory document, this deserves to be protected to ensure some “space to think” for the jurisdiction. This type of document is, also in the case of other EU institutions, exempt from the obligation of disclosure, in accordance with Article 4(3) of Regulation 1049/2001. In any event, such document pertains more to the judicial tasks of the court, and thus falls squarely within the exemption provided for in Article 15(4) TFEU. Indeed, disclosing the initial thoughts of the opinion of the Judge Rapporteur on the substance of the case would encroach on the margin of judicial assessment enjoyed by Court members (in particular the Judge Rapporteur) and could threaten the principle of secrecy of deliberation.

4.2.4 Access to deliberations

Throughput openness is limited by the secrecy of deliberations as stemming from Article 35 of the Statute.¹⁸⁶ By virtue of the exception provided for in Article 15(3) TFEU, the extension of the principle of openness to the CJEU is not set to change this situation. Despite the fact that this provision is likely to give rise to significant changes (such as the adoption of the decision on access to administrative court documents) in the way the Court interacts with the public, it does not question per se the *raison d’être* of the principle of secrecy of deliberations. As a result, it appears improbable that the CJEU and the Member States would decide in the future to do so, by amending the Statute, since public access to the deliberations might restrict the serenity of legal proceedings and expose judges to external pressure.

If opening up deliberations does not seem required to ensure the overall openness of the Court’s proceedings, a way to increase throughput openness could be to allow dissenting opinions.¹⁸⁷ These may indeed allow the public – more than a judgment fictionally written by a unanimous choir of voices – to grasp information from the debate judges had on particular points of law. According to many, this is the function that is already played by the opinions of Advocates General.¹⁸⁸ Regardless of the merits of these claims, two main arguments, one of a

¹⁸⁴ Communication with General Court official, 20 Feb. 2013.

¹⁸⁵ Art. 59 Rules of Procedure of the CJ, Art. 52 Rules of Procedure of the GC; Art. 45 Rules of Procedure of the CST.

¹⁸⁶ This articles reads: “The deliberations of the Court of Justice shall be and shall remain secret”.

¹⁸⁷ See e.g. Rasmussen, op. cit. *supra* note 23, at 1678-1679; Stone Sweet, op. cit. *supra* note 25, at p. 146; Weiler, op. cit. *supra* note 19.

¹⁸⁸ European Parliament, Dissenting opinions in the Supreme Courts of the Member States (Study), November 2012, PE 462.470, available at <www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf> (last visited 15 Nov. 2013). For a critical perspective on this common generalization,

legal and the other of a political nature, have historically constrained such a debate. The legal argument claims that the publication of a judge's opinion departing from the views of the majority in a case would question all the values protected by the secrecy of deliberations principle. A dissenting opinion would inherently question the authority of the court, its collegiality and unity, as well as the independence of each of its members.¹⁸⁹ The political obstacle is the renewable character of the mandate of the judges: dissenting opinions might be introduced only once the mandate is rendered non-renewable to avoid the strategic use of dissenting opinions to ensure renewal.¹⁹⁰ The debate about dissenting opinions will never advance as long as the principle of secrecy of deliberations and the possibility for renewable mandates remain.

4.2.5. Evaluation

Throughput openness could be immediately improved at a limited cost by broadcasting the hearings as well as facilitating access to the (already available) minutes and recordings, while keeping in mind the necessity to protect confidentiality when required. Unfortunately, abandoning the report for the hearing at the level of the Court of Justice constitutes a rather infelicitous decision from the perspective of the principle of openness as enshrined in Article 15(1) TFEU. Finally, in order to alleviate the potential burden on openness caused by the established principle of secrecy of deliberations, alternative solutions should be envisaged, such as, for example, openly discussing the impact that dissenting opinions may have on the overall openness of the Court.

4.3 Output openness

Output openness relates to the final stage of a proceeding in front of EU Courts.¹⁹¹ As such, its normative essence consists in guaranteeing access to the judgments, orders, and opinions of the Courts.¹⁹² The Courts' outputs are notified to the parties to the dispute – as a part of their right to fair trial.¹⁹³ The new Article 22(3) of the CJ Rules of Procedure extends the right to obtain

see Bobek, "A fourth in the Court: Why are there Advocates-General in the Court of Justice", 14 CYELS (2011-2012), 529 et seq, at 543 and 557-558.

¹⁸⁹ See e.g. Azizi, "Unveiling the EU Courts' internal decision-making process: a case for dissenting opinions?", (2011) *ERA Forum*, 49-68; Edward, "How the Court of Justice works", 20 *EL Rev.* (1995), 539-558. For a national judge's perspective on this debate, see Bobek, op. cit. *supra* note 188.

¹⁹⁰ For some examples of cases of non-renewal of national judges, allegedly caused by their voting behaviour, at the ECHR, see e.g. Flauss, "Brèves observations sur le second renouvellement triennal de la Cour Européenne des Droits de l'Homme", 61 *Revue Trimestrielle des Droits de l'Homme* (2005), 5-32. The mandate has since then been extended and made non-renewable. See Art. 21 of Protocol No. 14 to the ECHR, which entered into force on 1 June 2010. To know more, see Drzemczewski, "Election of judges to the Strasbourg Court: An overview", 4 *European Human Rights Law Review* (2010), 377-383.

¹⁹¹ Bengotxea, Moral Soriano and McCormik, "Integration and integrity in the legal reasoning of the European Court of Justice", in Weiler and De Búrca (Eds.), *The European Court of Justice* (OUP, 2001), at p. 44.

¹⁹² This section is informed by the methodology of a recent study aiming at retrieving European competition and State aid case law mentioning soft law instruments – Ștefan, *Soft Law in Court: Competition Law, State Aid, and the Court of Justice of the European Union* (Kluwer, 2012).

¹⁹³ Art. 6 ECHR does not entail an absolute duty to publish judgments, nor does it provide an absolute right to obtain all of the information held in a court's judgment. See e.g. ECtHR 22 Feb. 1984, Series A., no. 74 (*Sutter v. Switzerland*), para 34 in which the ECtHR held that it is sufficient that "anyone who can establish an interest may consult or obtain a copy of the full text of judgments of the Military Court of Cassation. To know more, see

certified copies of judgments and orders to third parties. Output openness requires a wider distribution of the Courts' judgments, orders and opinions, such as that accomplished through publication thereof in the European Court Reports and on the Court website.

4.3.1 Publication of outputs

The requirement to publish judgments of all courts varies across jurisdictions and is intrinsically related to the local legal culture. Common law countries, based on a system of precedent, have published judgments since the thirteenth century;¹⁹⁴ in civil law countries, publicity of judgments was introduced much later, with the practice of consistently communicating court decisions dating back only to the seventeenth century in France.¹⁹⁵ As evidenced by empirical studies, precedent plays an important role in EU law, and the impact of judicial decisions transcends the underlying dispute.¹⁹⁶ Therefore, publication of the case law of EU Courts is vital, and needs to be ensured by intervention of the public authority. The case law of the Court is published – a task entrusted also to the Registrar.¹⁹⁷ The authentic version of the judgments, orders, and opinions is published in the European Court Reports in paper version,¹⁹⁸ although some cases may be exempted from publication.¹⁹⁹ However, as access to electronic versions of the cases is more adapted to the current needs of information as well as less costly, the CJEU recently decided to abandon the paper version and embrace the digital source. Such access is ensured free of charge on the CURIA webpage and the text of the decisions published online are authentic in the language of procedure. Exempting cases from publication in the ECR has important consequences from a linguistic point of view, as many cases are often not translated in other languages than French, restricting the access thereto considerably for those that do not speak this language (see section 4.3.2. below).

The new and improved search engine of the Court, InfoCuria, offers the possibility to undertake searches of the case law of the European Courts. This enhanced dramatically the transparency of judicial output, as previously electronic case law search was split between Eurlex (for the judgments, orders and opinions issued before 1997) and Curia (for the judgments, orders and opinions issued after 1997). Moreover, the opinions of the Advocates General were uploaded to CELEX only starting in October 1987.²⁰⁰ Even though they have been progressively incorporated,²⁰¹ the task to retrieve all pre-1987 opinions used to be a complicated one, as they

Voermans, "Judicial transparency furthering public accountability for new judiciaries", 3 *Utrecht Law Review* (2007), 148-159.

¹⁹⁴ Seipp, "Medieval English Legal History – An Index and Paraphrase of Printed Year Book Reports, 1268 – 1535", available online at <www.bu.edu/law/seipp/> (last visited 15 Nov. 2013). For a different account, see Godding, "Jurisprudence et motivation des sentence, du moyen âge à la fin du 18e siècle", in Perelman and Foriers (Eds.), *La motivation des décisions de justice* (Bruylant, 1978); Sauvel, "Histoire du jugement motivé", 61 *Revue du droit public* (1955), 5 et seq.

¹⁹⁵ J. P. Dawson, *The Oracles of the Law* (The University of Michigan Law School, Ann Arbor, 1968), at p. 305.

¹⁹⁶ See e.g. Stone Sweet, "The European Court and Integration", in Stone Sweet (Ed.), *The Judicial Construction of Europe* (OUP, 2004), Chs. 3 and 4; Bengoetxea, "The scope for discretion, coherence, and citizenship", in Wiklund (Ed.), *Judicial Discretion in European Perspective* (Kluwer, 2007).

¹⁹⁷ Art. 20 Rules of Procedure of the CJ, Art. 86 Rules of Procedure of the GC; Art. 19 Rules of Procedure of the CST.

¹⁹⁸ As per the disclaimers present on the Curia webpage "the texts of the judgments, orders, opinions and notices present on the site are subject to amendment; only the versions published in the ECR or the O.J. are authentic." See <curia.europa.eu/jcms/jcms/T5_5135/> (last visited 15 Nov. 2013).

¹⁹⁹ Following the 2004 enlargement, a policy of selective publication of judgments and orders was adopted.

²⁰⁰ According to the CELEX Reference Manual, 68.

²⁰¹ Brown and Kennedy, *The Court of Justice of the European Communities*, 5th ed. (Sweet & Maxwell, 2000), p.32.

were not all available in Eur-Lex. In order to palliate this difficulty for early Advocate General opinions, the research needed to be conducted through fee-based databases such as Westlaw. Since online availability of judicial outputs is critical to ensuring openness,²⁰² the recent efforts in this direction should be praised. Access to unofficial versions of the EU Courts judgments is relatively easy for people who have access to the Internet, and the Court's output transparency fares well from this point of view. However, not all case law is translated in all the EU languages, making access difficult – and at times impossible – for some linguistic versions.

4.3.2 *Lost in translation*

Language is sometimes an obstacle to accessing the EU Courts' case law, given that not all judgments are translated and/or published. Traditionally, the language of deliberation is French, the internal working language of the Court.²⁰³ Most of the judgments should be in principle translated in all official languages, while giving priority to the language of the case, which is deemed the authentic version.²⁰⁴ Because of the high number of cases that required translation, the Court was often confronted with problems that led to backlogs in the publication of other language versions than French.²⁰⁵ Until 1994 the delay between the publication of the French and English versions of the orders and judgments (in cases in which English was not the procedural language) took up to two years.²⁰⁶ Another consequence stemming from the high volume of translations was the decision to publish from 1989 to 1991 some cases only in their summary form. The full texts were made available only in the language of the case and the opinions of the Advocates General only in the language in which they were delivered.²⁰⁷

Following the 2004 enlargement, a policy of selective publication in the ECR was adopted.²⁰⁸ This was because, on the one hand, the accessibility of case law was jeopardized by the large amount of published material and, on the other hand, it was extremely difficult to organize translation in all the official languages.²⁰⁹ At the CJ, judgments (other than in preliminary ruling proceedings) delivered by Chambers of three judges, or delivered by Chambers of five judges ruling without an opinion from the Advocate General, as well as Court orders, are exempt from publication unless otherwise decided by the relevant Chamber.²¹⁰ At the level of the GC, the decision to publish judgments of Chambers of three judges is made on a case-by-case basis by the Chamber itself, which results in different translation policies.²¹¹ In these circumstances, drawing up a set of common criteria for translations would be commendable. Yet, given the differences in composition of the chambers (the default is 5-judge chamber at the CJ and 3-judge chamber) this might not be easy to attain. Also, those judgments

²⁰² Curtin and Meijer, op. cit. *supra* note 5, 109 et seq. at 121.

²⁰³ See presentation of the CJEU, available at <curia.europa.eu/jcms/jcms/Jo2_7024/> (last visited 15 Nov. 2013). For an account of the reasons and consequences stemming from this choice, see Gaudissart, op. cit. *supra* note 157, pp. 137-160.

²⁰⁴ Brown and Kennedy, *The Court of Justice of the European Communities*, op. cit. *supra* note 201, at p. 29.

²⁰⁵ Edward, "How the Court of Justice works", 6 EL Rev (1995), 539 et seq. at 548-549.

²⁰⁶ Ibid.

²⁰⁷ Brown and Kennedy, *The Court of Justice of the European Communities*, op. cit. *supra* note 201, at p. 30.

²⁰⁸ Gaudissart, op. cit. *supra* note 157, pp. 154-155.

²⁰⁹ Court of Justice of the European Communities Annual Report 2004, I-A(1.3). On the post enlargement translation challenges, see Bobek, "The binding force of Babel: The enforcement of EC law unpublished in the languages of the new Member States", 9 CYELS (2006-2007), 43 et seq.

²¹⁰ See "Basis for publication" available at <curia.europa.eu/en/content/juris/contenu.htm#principes> (last visited 15 Nov. 2013).

²¹¹ Ibid.

decided by a single judge and GC orders are not published in the ECR, unless decided otherwise.²¹² Unpublished judgments and orders are accessible on the CURIA web site in the language of the case and the language of deliberation.²¹³ Nevertheless, there is case law that does not necessarily follow these publication rules, as some previously decided cases are published only in an abridged form in English. In these situations, one has to rely on the French version available on the ECR for a more complete version. Moreover, the judgments do not bear any indication as to the completeness of the translation, and only after a very careful reading can one realize that entire paragraphs are missing from the text.²¹⁴

Documents drawn up in the language of the case, or any other language authorized by the Courts, are deemed authentic.²¹⁵ In delivering their opinions, Advocates General may use a language other than the language of the case.²¹⁶ This means that only the text of the judgment in the language of the case and the opinion of the Advocate General in the language in which it was officially delivered are authentic.²¹⁷

4.3.3 *Transparency of statistics*

The CJ began publishing reports of activity in 1972,²¹⁸ almost twenty years after its inception. Some of these reports contain the disclaimer that they are meant for information only and cannot be quoted as official publications of the Court. Moreover, they are not always consistent in statistically recording the case law.

Several reports do not give any details as to the number of cases decided yearly according to the field.²¹⁹ While they might provide some information concerning the breakdown of cases per large sectors of activity such as “competition”, “external relations”, “free movement of capital”, etc., a subsector breakdown of cases has not been compiled to date. For instance, if one is interested in the number of cases dealing with subsectors of activity, such as the motor vehicles industry, distribution agreements, or banking, one would need to estimate the number by oneself. Such enterprise has been recently rendered more feasible by InfoCuria, which allows a “sector search” option. However, providing more detailed statistics in the annual report would allow a more accurate perspective on the work of the Court.

Moreover, there is inconsistency in the way in which the cases are counted. Until 2002, the annual reports presented the gross and net number of judgments, orders and opinions issued by the Courts - that is, both the figures that do not take into account the cases joined on grounds of similarity and the figures that do take joined cases into account. Since 2002, only the gross

²¹² Ibid.

²¹³ Ibid.

²¹⁴ To take a random example retrieved by one of the authors while conducting research on European competition case law, the judgments of the GC in Case T-21/99, *Dansk Rørindustri*, [2002] ECR II-1681; Case T-16/99, *Lögstör Rör*, [2002] ECR II-1633; Case T-17/99, *KE KELIT*, [2002] II-1647; and Case T-15/99, *Brugg Rohrsysteme*, [2002] ECR II-1613 are published incompletely in English. These cases were decided in 2002, a time when the rules mentioned above were not in force and one would have expected to find complete English translations for all case law (see Ștefan, op. cit. *supra* note 192, at p. 255).

²¹⁵ Art. 41 Rules of Procedure of the CJ, Art. 37 Rules of Procedure of the GC; Art. 29 Rules of Procedure of the CST.

²¹⁶ Art. 38 (8) Rules of Procedure of the CJ.

²¹⁷ Brown and Kennedy, op. cit. *supra* note 201, at p. 27.

²¹⁸ They were initially called Synopsis of the Work of the Court of Justice of the European Communities, then the title changed to Annual Reports in the 1990s.

²¹⁹ See, for an example, Ștefan, op. cit. *supra* note 192, at p. 261.

number of cases is presented in the reports, meaning that each case is counted, even though a single judgment, order or opinion was issued in several joined cases.

4.3.4. Evaluation

The several shortcomings in the ways in which the Courts' output is translated, recorded and quantified illustrate that the principle of openness is not fully satisfied by granting free access on the Internet to case law databases. While Internet availability can satisfy the need for access to particular case law in a timely manner, it should be recalled that not all judgments are translated in all the official languages, and that mastery of some other EU official language, typically French or English, remains sometimes essential. Moreover, not all judgments are completely published on the webpage. Also, due to inconsistencies in the official statistics, a clear perspective of the CJEU's activities as an institution is missing.

The problems presented in this section also affect legal scholars engaged in empirical studies as well as the historian or any other researcher committed to data collection. Gathering complete data is not a straightforward enterprise, given the language limitations, and the fact that the keyword searches either retrieve a lot of irrelevant hits or do not retrieve all relevant material, when complex queries and Boolean operators are employed. We submit that this is not just an issue of dry academic methodology. Indeed, even though facilitating empirical research should not constitute a priority for the Court, enabling academics and legal professionals to better explain judicial work to the public might have a positive impact from an openness point of view.

5. Conclusion

Opening the activities of the Court to the public has to be done within the limits set by Article 15(3) TFEU: the rules on access to documents apply to the CJEU only when it exercises administrative functions, and do thus not apply to the exercise of judicial activities. This exception is justified by the necessity to ensure that the act of delivering judgments is protected from external interference. Commendably, in February 2013 a decision was published regulating access to the CJEU's documents held in the exercise of its administrative functions. This article argued that in the interest of openness and legal certainty, further legislative action is needed to distinguish between the Courts' judicial and administrative tasks, in order to ensure the exact limits of the Article 15(3) exception. Failing to do so, it will be left to the case law to define the issue. In any event, certain institutional adjustments need to be made in order to guarantee more openness in carrying out the Courts' administrative tasks.

While our analysis demonstrates that the EU Courts score quite well from an openness point of view at the input, throughput, and output stages of the judicial activity, it also shows that they still face several important challenges. These relate, among others, to the limited third-party access to the case file and to substantial background information regarding the cases, the difficulty to attend hearings outside of the Court premises, as well as the partial translation of certain material. One of the most important challenges is closely connected to the principle of multilingualism, and the Court will have to find a way to reconcile the existing language policy with requirements of openness, in the context of limited translation resources and an increasing complexity and variety of substantive legal issues addressed submitted for its judgment. The Court could also enhance its links with the media by making use of popular platforms of communication and by streaming online webcasts of hearings.

While the CJEU is manifestly no longer “tucked away in the fairyland Duchy of Luxembourg” as famously depicted by Eric Stein,²²⁰ it needs to continue its struggle to exit the antiquated era characterized by grey areas, shadows and a lot of print and dusty paper. The growing public attention, generated by the reformed judicial appointment system,²²¹ the threatening social media as well as a ballooning blogosphere²²² is progressively bringing the Court’s internal work under the spotlight. In these circumstances, it is the time for the EU’s judicial body to take seriously the openness requirement as it stems from Article 15 TFEU. The recent decision on access to documents, the reshuffling of the Curia search platform, as well as the brand new Twitter account (available in English and in French) are signs that the Court is progressively adapting to the *zeitgeist* of openness and transparency.

²²⁰ Stein, “Lawyers, judges, and the making of a transnational Constitution”, 75 AJIL (1989), 1-27, at 1.

²²¹ See 2011 Activity Report of the panel provided for by Art. 255 TFEU, Brussels, 22 Jan. 2011 (Council, 6509/11) and 2012 Activity Report of the panel provided for by Art. 255 TFEU, Brussels, 26 Dec. 2012 (Council, 5091/13).

²²² Blogs devoted to the EU Courts’ activities have been mushrooming in recent years. Among the most established and followed are: EU Law blog, ECJBlog, EUtopia, Europeanlawblog and Chillin’Competition.